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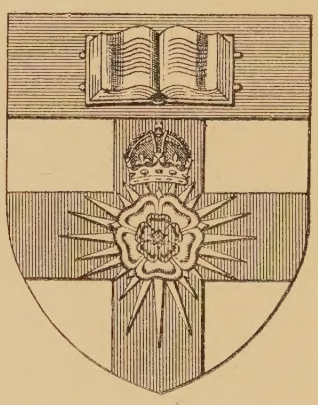

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THE

LAW REPORTS.

529 N

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

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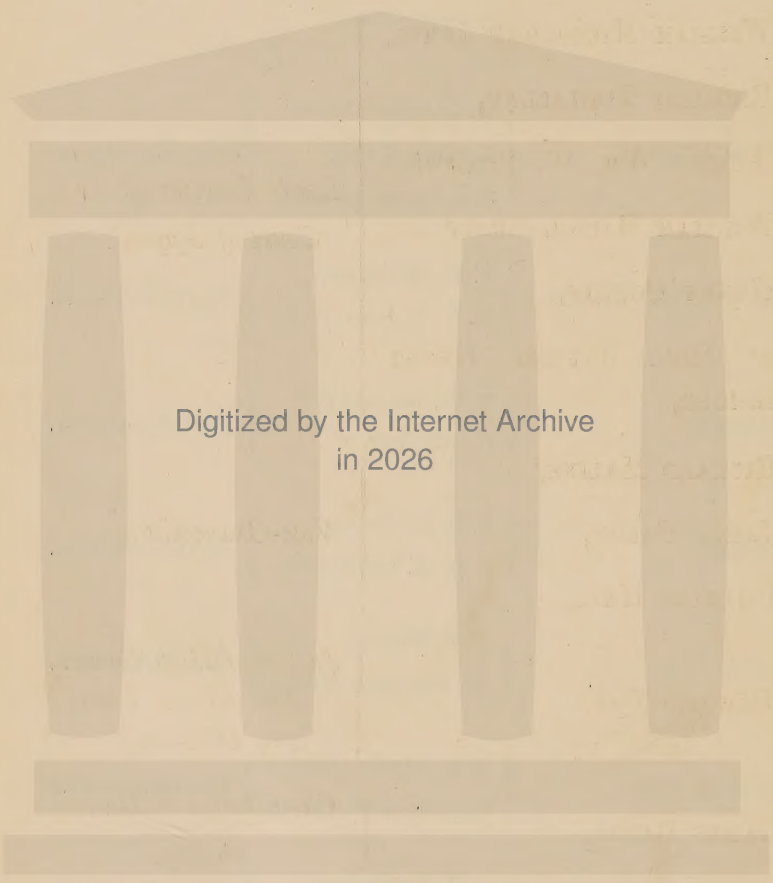

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

Ex parte BANCO DE PORTUGAL. *In re* HOOPER.

C. A.
1880
Feb. 23.

Court of Appeal—Jurisdiction—Rehearing—Bankruptcy Appeal—Pending Appeal to House of Lords—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 18—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 9.

Whether the Court of Appeal has jurisdiction to rehear a bankruptcy appeal, *quære*.

But, if there be such a jurisdiction, the Court will not, while an appeal to the House of Lords from an order made by it on a bankruptcy appeal is pending, rehear the appeal *pro formâ*, for the purpose of inserting in its order evidence which was not before it when the appeal was heard, leaving the date of the order unaltered, or for the purpose of making a new order, bearing a date subsequent to the date of the presentation of the appeal to the House of Lords, with the new evidence inserted in it, but in other respects unaltered.

But, *semble*, that, if by an accidental slip evidence, which was really before the Court on the hearing of the appeal, had been omitted from the order, the Court could rectify the error, notwithstanding the pendency of an appeal to the House of Lords.

THIS was a motion on behalf of the *Banco de Portugal* that an appeal by them from an order made in this matter by Mr.

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Registrar *Murray* as Chief Judge, on the 1st of February, 1879, which was heard by the Court of Appeal on the 4th of April, 1879 (1), might be reheard *pro formâ*, and the notarial translation of the original certificate under the hand and seal of *Henrique Cesar Ferreira Pinto*, Scrivener of the Tribunal of Commerce of First Instance of *Oporto*, duly authenticated before the British Vice-Consul at *Oporto*, might be inserted in the order of the Court of Appeal of the 4th of April, 1879, dismissing the appeal, as having been read before that Court.

The document in question was not in fact produced to the Court on the hearing of the appeal, though a copy of it was handed to the Appellants' counsel in Court during the hearing of the appeal, but as it had not then been duly authenticated it could not be adduced in evidence. No application was made to the Court to postpone the hearing of the appeal.

The object of the present application was to enable the bank to use the document in question as evidence upon the hearing of an appeal which they had presented to the House of Lords from the decision of the Court of Appeal.

The claim of the bank was to prove in the liquidation of *J. K. Hooper* and *J. K. Hooper*, the younger, who had carried on business in *London* as *Richard Hooper & Sons*, in respect of some bills of exchange which had been drawn by a firm of *Hooper Brothers*, of *Oporto*, upon and accepted by *Richard Hooper & Sons*, and of which the bank were the holders for value. The firm of *Hooper Brothers* consisted of the same partners as the English firm. *Hooper Brothers* had become bankrupt in *Portugal*, and the bank had received a dividend on the bills in the distribution of the Portuguese assets. The Court of Appeal held that the bank could not be admitted to prove in the English liquidation without giving credit for what they had received in the Portuguese bankruptcy. The bank desired to shew by the document in question that the Portuguese bankruptcy had commenced before the English liquidation. The document stated that *Hooper Brothers* were declared bankrupts in the *Oporto* Court on the 2nd of January, 1878, to reckon from the 28th of November, 1877. The liquidation petition was filed on the 14th of December, 1877.

(1) 11 Ch. D. 317.

Cookson, Q.C., and *S. Woolf*, for the bank:—

Evidence cannot be used before the House of Lords which is not inserted in the order of the Court below: *Baesh* v. *Moore* (1); *Attwood* v. *Small* (2). At any rate, the House of Lords would remit the case to this Court. The decision of this Court in *Flower* v. *Lloyd* (3) may be cited against us, but that was only a decision that the Court of Appeal has no jurisdiction to rehear an appeal from the High Court. An appeal from the Court of Bankruptcy stands in a wholly different position. Sect. 71 of the *Bankruptcy Act*, 1869, gives to every Court having jurisdiction in bankruptcy under that Act the power to "review, rescind, or vary any order made by it in pursuance of this Act." It provides also that any order made by the Chief Judge shall be subject to an appeal to the Court of Appeal in Chancery, which Court "for the purposes of this Act . . . . shall have all the jurisdiction, powers, and authorities of the Court of Bankruptcy, to be exerciseable either originally or on appeal." And by sect. 18 of the *Judicature Act*, 1873, there is transferred to the present Court of Appeal "all jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy." The transfer of jurisdiction is not, therefore, in the case of the Court of Appeal in Bankruptcy, as it is in the case of the Court of Appeal in Chancery, confined to the appellate jurisdiction. Moreover, sect. 9 of the *Judicature Act*, 1875, provides that the *London* Court of Bankruptcy shall not be united with the Supreme Court, and that its jurisdiction shall not be transferred to the High Court, but shall continue the same as if no such transfer had been made by the Act of 1873, and that the appeal from the *London* Court shall lie to the Court of Appeal in accordance with the Act of 1873. And rule 9 of Order LVIII. makes a special provision as to the time within which bankruptcy appeals must be brought. *Ex parte Ditton* (4) shows how fully the old jurisdiction of the Court of Bankruptcy has been preserved. The pendency of the appeal to the House of Lords is no objection. If the Court accedes to our application, we shall not have to alter

(1) 3 B. P. C. 546.
(2) 6 Cl. & F. 232.
(3) 6 Ch. D. 297.
(4) 1 Ch. D. 557.

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our case on that appeal. It will only be necessary to put in a supplemental case, and to alter the date of the order of this Court. The decision of this Court on the former occasion would not be affected.

[Cotton, L.J.:—Assuming that we have jurisdiction to do what you ask, ought we to exercise it? Ought you not, when you became aware of the document, during the hearing of the appeal, to have asked that the hearing should stand over until you could produce the document in evidence properly authenticated?]

The production of the document was an entire surprise to us.

[They referred also to *Ex parte Reddish* (1); *Ex parte Keighley* (2).]

De Gex, Q.C., and *McCall*, for the trustee in the English liquidation, were not heard.

James, L.J.:—

It appears to me that there are several objections to this application. First of all, the substance of it is this, that we should introduce into our order, as part of the materials which were before us, that which was not before us at all, evidence which was not before us and was not tendered to us. If we did that we should be saying the thing which is not. If there had been a mere slip in entering the evidence in the order we could have cured it; there is a power in the General Orders to do so. If this document had been really before us, but had not been brought to the attention of the Registrar, and had been omitted from the order, we might have corrected the mistake. But we are now asked, because some evidence was not tendered to us, which might and ought to have been tendered if the applicants had got it, but which they now think material to their case, to introduce that evidence into our order. Such a thing is quite out of the question.

It is said that the application is for a rehearing. I for one will certainly not rehear the case on these materials. If we did rehear it, not for the purpose of rescinding or varying the order

(1) 5 Ch. D. 882. (2) Law Rep. 9 Ch. 667.

we made, but for the purpose of confirming it and introducing into it fresh evidence, we should not be dealing fairly with the jurisdiction of the Court. We are not asked to rescind our order. If we were asked to rescind it, and if we ought to rescind it upon new evidence, there would be a fresh order which would be the subject of a fresh appeal. We must refuse, therefore, to rehear the case. The applicants will have the advantage of going to the House of Lords and saying that they applied to this Court for a rehearing and were refused. It will then be for the House of Lords to deal with the case. We have not, as it appears to me, any jurisdiction to grant the application.

BRETT, L.J.:—

The first point taken in argument was this, that, assuming there had been no appeal to the House of Lords, we might have reheard the case and have admitted this additional evidence. It is not necessary to decide that point, though I am inclined to think that we might. But, assuming that we could, there is an appeal to the House of Lords. That appeal is pending against the order already made by this Court, and what we are asked to do is, either to alter that order, leaving the date of it as it stands, and leaving the appeal against it as it stands, or to set aside that order and make a new order against which the appeal already presented is to stand.

Now it seems to me that if we were to do the first, that is, to alter the order, without altering its date, by putting into it as one of the grounds of it something which was not before the Court at the time when the order was made, we should be doing very wrong. We should be practically stating that something had happened before us which did not happen; we should be making an untrue record. Therefore, what we are really asked to do is, to set aside our former order, and to make a new order, the parties not proposing to withdraw their appeal to the House of Lords, but to leave that appeal to stand against the new order. Then arises the objection which has been pointed out by Lord Justice *James*, and which is, as it seems to me, an insuperable objection, viz., that in that case the appeal would be dated some months before the order against which it would be supposed to be

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brought. It seems to me that we have no authority to deal in that way with the House of Lords; we have no such jurisdiction. But, even if we had, there arises the objection mentioned by Lord Justice *Cotton*, that the fact which it is now desired to introduce was known to the counsel for the bank in time for them to have asked the Court to postpone the making of their order until after that fact had been manifested by proper evidence. That of itself seems to me to be a fatal objection to the present application. There are, therefore, two fatal objections, and probably Mr. *De Gex*, if he had been heard, would have pointed out others.

COTTON, L.J.:—

It is not necessary on the present occasion to give any opinion whether this Court has a power of rehearing, even after an appeal has been presented to the House of Lords from an order made by itself upon a bankruptcy appeal. But we must consider what is really meant by a rehearing. A rehearing is where a party who has been before the Court brings fresh evidence, and asks the Court on that fresh evidence to rehear the case, and to make an order different from that which it has in fact made. Such a new order would in no way disturb or alter the order before the House of Lords; it would be a fresh order made on fresh evidence. Possibly this Court may have such a power, even though an appeal from its former order has been presented to the House of Lords. I give no opinion one way or the other. But I do say this, that if, after an appeal has been presented to the House of Lords, an application for a rehearing is made to this Court, this Court, if it has jurisdiction to rehear, ought to exercise it with the greatest care, and only in a very strong case. But on the present occasion what is asked, although it is a rehearing in name, is not so in substance. We are not asked to rehear the case for the purpose of coming to any other decision than that at which we arrived on the hearing. We are asked to introduce into the order now under appeal to the House of Lords, so that that appeal may stand, a document which was not before us when we made our order, and which may be material for the purpose of enabling the House of Lords to come to a decision on the question. If we have jurisdiction to do that, in my opinion we certainly ought not

to do it in the present case. First, because the document in question was in Court and in the hands of counsel while the appeal was proceeding, and if they had desired that the case should go to the House of Lords with materials which they thought important, they ought then to have made an application to this Court to postpone the hearing of the appeal. Again, if we were to insert this document in our former order, it would be representing to the House of Lords that a document was before this Court which was not before it, and in my opinion that ought not to be done, and if we were to make a fresh order, the present appeal to the House of Lords would be gone, and the proper course would have been for the Appellants to withdraw their present appeal, and then to ask us to rehear the case. In my opinion we cannot accede to the application. But I agree with Lord Justice *James* that our decision must in no way be taken as a decision that the Court has not power to correct an accidental slip in its order after an appeal has been presented to the House of Lords. If some evidence, which had been before this Court, had, by reason of some slip in drawing up the order, not been mentioned in the order, or there had been some other accidental slip which practically prevented the House of Lords from listening to that which had been in reality and substance before this Court and had been considered by it in giving its decision, such a case is entirely untouched by our present decision.

Solicitors for Bank: *M. Abrahams & Roffey.*
Solicitors for Trustee: *Loxley & Morley.*

C. A.
1879
M. R.
May 9.
C. A.
1880
Feb. 23, 24.

In re WORTHINGTON & CO.'S TRADE-MARK.

Trade-marks—Registration of similar Trade-mark—38 & 39 *Vict. c.* 91, *s.* 6.

W. & Co. proposed to register as a trade-mark for ale a triangle with a double outline, inscribing within the double outline the words "*Beccles Brewery.* Established 1830," the inner triangle having within it a conspicuous figure of a church. *B. & Co.*, whose trade-mark for pale ale was a plain triangle, which in use was coloured red, applied to prevent the registration of the proposed trade-mark as being so similar to theirs as to be calculated to deceive:—

Held, by *James* and *Brett*, L.JJ., affirming the decision of *Jessel*, M.R., *dissentiente Cotton*, L.J., that as *W. & Co.* would be at liberty to print their trade-mark in whatever colour they pleased, and if printed on a red ground it would be so similar to that of *B. & Co.* that a purchaser might be misled, the registration ought not to be allowed.

IN 1878 *Worthington & Co.* became proprietors of a brewery at *Beccles* in *Suffolk*, which had been established in 1830. In 1879 they proposed to register a trade-mark. The proposed mark consisted of a representation of the parish church of *Beccles*, inclosed in a nearly equilateral triangle. This triangle was inclosed in a larger triangle, so as to leave a border of uniform width, in which were printed the words "*Beccles Brewery.* Established 1830."

This application was advertised in the *Trade-marks Journal.* Messrs. *Bass & Co.*, the well-known brewers of *Burton-on-Trent*, sent in to the Registrar a notice of opposition, on the ground that the proposed mark resembled a registered trade-mark used for many years by them upon pale ale, and that, therefore, according to 38 & 39 Vict. c. 91, s. 6, it ought not to be registered. Their registered trade-marks for pale ale were two. One was a simple equilateral triangle; the other an equilateral triangle, inclosed in an oval.

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In re WORTHINGTON & Co.'s TRADE-MARK.

with words round it. The triangle was always coloured red, but, as in registration no notice is taken of colours, this did not appear on the register. They were also in the habit of using a red triangle, having a border like that of *Worthington & Co.*, with words in it, but this was no part of their registered mark.

Bass & Co. moved before the Master of the Rolls, on the 9th of May, 1879, for an order restraining *Worthington & Co.* from proceeding with the registration.

Various witnesses on behalf of *Bass & Co.* deposed that the pale ale brewed by *Bass & Co.* was frequently spoken of as "triangle ale." Several eminent brewers at *Burton* deposed that in their opinion the proposed trade-mark would be calculated to deceive, "as the two marks might, and probably would, be exhibited together in houses where fermented liquors are sold."

Several witnesses on behalf of *Worthington & Co.* gave evidence negativing the statement that any ale of *Bass & Co.* was known in the trade as "triangle ale." *Worthington & Co.* deposed that they had not adopted the triangular arrangement with any intention of making their trade-mark resemble that of *Bass & Co.*, but only because one of the managers of the firm who printed for *Worthington & Co.* considered it the most convenient form for introducing the words which formed part of the proposed trade-mark.

Chitty, Q.C., and *J. Cutler*, for the motion.

Davey, Q.C., and *Bradford, contrà.*

JESSEL, M.R.:—

Probably there is no one on the Bench or at the Bar who is more familiar with trade-marks than I am, and I am sorry to say that my experience as regards the efforts of traders to obtain as new marks well-known established marks belonging to well-known and highly reputed businesses, is, that they are anything but creditable to the great number of traders who make those

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attempts. It is the constant practice of persons registering new marks to get as near as they can to an old mark which has acquired a great reputation. At first I thought there might be some want of invention on the part of the owners of businesses who required new marks; but the attempts are so constant and so similar, that the conviction has forced itself upon my mind rather reluctantly that there is a general desire on the part of new traders, or of persons requiring new marks, to run as near as the law will allow them to the old marks. Innumerable cases have come before me as acting Commissioner where a proposed mark has been rejected because it was too near an old mark. A fortnight afterwards there comes an application by the same man to register the same mark with a slight alteration. That is rejected. In another fortnight another attempt is made to register it with another slight variation, and continued attempts are thus made, until a point is reached at which the Commissioners think that it is time to give notice to the owner of the original mark, it being my practice not to allow the owner of the old mark to be troubled as long as the new mark is very nearly the same as the old; but when, after successive attempts, it has been made so far different that there may be a fair question raised, then I direct notice to be given to the owner of the old mark, that he may judge for himself whether it is worth his while to try to prevent the registration. This is done because the case has reached a point where it is not so clear as that the Commissioner thinks it right to reject the new mark as Commissioner, but leaves the question to be decided by a Court of Law. Here the business of *Worthington & Co.* is represented to me as an old established business, which makes a good article, and must be anxious that such good article should be distinguished from all other articles made in the same trade. If the proprietor of that business is an honest man and honestly desirous of distinguishing his goods by a trade-mark from the goods of everybody else, he will choose a mark not in the slightest degree resembling that of anybody else, because his anxiety and desire must be that the public shall by no possibility mistake his goods for the goods made by anybody else. Therefore, when a man comes for a new mark, and is told that his mark bears even the slightest resemblance to

that of anybody else, if he is sincerely wishful of obtaining a distinctive device, he will of course at once adopt something else. This applies most emphatically where the device is such a common one as a triangle.

Now, what are the facts in this case? Messrs. *Bass*, old established traders, have made pale ale for a great number of years, and have adopted as their trade-mark the very simple mark of a red triangle. The Act of Parliament does not protect colour, consequently they can only register a black triangle. Messrs. *Worthington & Co.*, who have succeeded to an old-established brewery, wish to adopt a trade-mark. How are they going to distinguish their ales? By a large triangle with a double outline exactly like that used by Messrs. *Bass*. Though the double outline does not form part of *Bass & Co.'s* registered trade-mark, still they are in the habit of using it. Messrs. *Worthington & Co.* adopt the triangle. They put a church in the middle, and they put names round the triangle, but Messrs. *Bass* also have their names round the triangle. People do not care very much about reading the names, so I do not think the difference of names very important. They have, however, varied the triangle by putting a church in the middle. Now, is such a trade-mark intended to deceive, or is it calculated to deceive? I have evidence before me to shew that people would be deceived. Colour is not protected by the Act; these gentlemen, therefore, may colour their triangle red, which of course will have the effect of obscuring the church. That being so, would it be calculated to deceive? I have no doubt or hesitation in saying that I entirely agree with the gentlemen who swore that it would. Messrs. *Worthington*, if they wanted to distinguish their pale ale, ought to have chosen any other shape in the world rather than that well-known triangle which distinguishes Messrs. *Bass's* ale, and I grant the motion with costs.

Messrs. *Worthington & Co.*, appealed. The appeal came on to be heard on the 23rd of February, 1880.

Davey, Q.C., and *Bradford*, for the Appellants:—

We submit that in trying this question whether there is such a

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similarity as to bring the case within 38 & 39 Vict. c. 91, s. 6, the registered marks only can be looked at. One is a plain triangle, the other is a hollow triangle with a border and a conspicuous church in the centre, and there is no possibility of mistaking one for the other. The possibility of colouring one trade-mark in such a way as to obliterate the distinction between it and that of Messrs. *Bass & Co.* is not to be regarded. That would be a fraudulent use of our mark, which the Court under its general jurisdiction could restrain. But it is no objection to the trade-mark in itself. The Court will not proceed on the assumption that a fraudulent use of our mark will be attempted. The result of the decision, if upheld, will be to give Messrs. *Bass & Co.* a monopoly of triangles, and as the number of geometrical figures is limited, it will soon become impossible for a tradesman to register a mark with any geometrical figure in it, as the whole set of figures will have been appropriated.

Chitty, Q.C., and *J. Cutler, contrà*:—

We do not allege any fraudulent intention to imitate our trade-mark, but we say that there is such a similarity that purchasers would be likely to be misled.

[COTTON, L.J.:—The Act prohibits the registration of a trade-mark so similar to another as to be "calculated to deceive"; are you not asking us to construe that as meaning "which may be used so as to deceive"?]

We say that a mark is calculated to deceive if so similar to another that it may without fraud probably be so coloured as to be readily mistaken for it. It is not necessary to shew such a similarity that the marks would be liable to be mistaken if seen side by side: *Seixo* v. *Provezende* (1); and, as is shewn by the same case, a trade-mark must not be adopted which will cause goods to bear the same name in the market as the goods of the older trader. Now our ale is known as "triangle ale." Here there is no reason for adopting a triangle except that *Bass & Co.* use it already. The triangle is the essential element of *Bass & Co.'s* mark, and as the registration does not deal with colour, *Bass*

(1) Law Rep. 1 Ch. 192.

& Co. can colour the triangle as they please, they are not restricted to a plain triangle. *Worthington & Co.*, if their mark is registered, can also colour it as they please, and if they colour it a deep red the two marks will, to careless observers, come to the same thing. There is no answer to the affidavits by the trade that the mark will deceive. Similarity between the marks as actually used, not merely as registered, will be looked to: *Rosing's Case* (1). The case of *In re Orr Ewing's Trade-Marks* (2), reversing the decision of the Court of Appeal (3), is in our favour.

Davey, in reply :—

Bass & Co. cannot be entitled to a parti-coloured triangle or to a triangle with designs on it; they are restricted to a triangle of one colour. The distinctive elements of our trade-mark are the church and the name of *Beccles Brewery;* and there is nothing calculated to deceive.

JAMES, L.J. :—

In this case I am of opinion that we ought not to overrule or dissent from the conclusion at which the Master of the Rolls has arrived, that is, that the trade-mark proposed to be registered by Messrs. *Worthington* is calculated to deceive. In dealing with the words of the Act of Parliament, it appears to me (though I do not usually like to use general maxims in considering Acts of Parliament or any other instrument) that this Act is one as to which we may fairly say, that its provisions ought to be construed liberally, so as to advance the remedy and repress the mischief. It appears to me that the intention of the Legislature was to prevent a person having a trade-mark from being liable to be injured by another trade-mark, which might be used to imitate his or be passed off as his. Now, the proposed trade-mark of Messrs. *Worthington*, no doubt, as it stands in black and white, seems to be very substantially different from that of Messrs. *Bass & Co.* But then, I think, we must look at this, that the *Trade-Marks Act* says nothing about the colour, and the Appellants might use exactly the same colour upon their trade-mark which Messrs. *Bass* have used upon theirs; that is to say, each of the marks might be a mass of red, on one of

(1) Sebastian on Trade-Marks, p. 379. (2) 28 W. R. 17. 4 App Cas 479 H.L.
(3) 8 Ch. D. 794.

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which masses of red there would be a design of a church. Of what colour that design of a church might be, I do not know; it might be red of the same shade or a different red; but there might be a mass of red with a design on it which would be, with that difference, the same as *Bass's* triangular mass of red. I cannot help feeling that if that were so, a great number of other persons would probably try to register triangles with other devices upon them, and without imputing anything to Messrs. *Worthington*, other people might not be careful to keep up the distinction between their trade-mark and that of Messrs. *Bass*, and the little distinction which was put inside their triangles might, and, in all probability would, disappear. I cannot help thinking that the same kind of thing would happen as to this device as we are told happened as to the signature of the great Lord Protector of this country, that the *Oliver* was getting to be written very large and the *Cromwell* was getting to be written very small, so that Mr. *Cromwell* was disappearing in the *quasi* regal *Oliver*. I cannot help thinking that if such designs in a triangle were allowed to be registered, there would be great danger that the design within the red triangle would get fainter and fainter, and the solid red would get stronger and stronger, so that in a very short time there would be substantially nothing but a solid red triangle. I also think that great weight is to be attributed to the observation of the Master of the Rolls, that there is no mischief done here by refusing registration; the mark which it is sought to register is not a trade-mark which has been used, the Appellants have not acquired any right or reputation by means of it, they are only seeking a new registration of it, and it would be as well and quite right to have a device which does not in any way resemble, and is not like the triangle, by which Messrs. *Bass's* ales are generally known. I think, therefore, that the judgment of the Master of the Rolls cannot be dissented from. We have a great mass of people, who are experts, men in large business, who give their evidence as experts, and they say that the two marks would be likely to be taken one for the other.

Brett, L.J.:—

It seems to me that the arguments in the present case have raised two questions, one of law, and one of fact.

The question of law is whether, in interpreting this Act of Parliament, we are to look only at the marks as printed in the advertisement, or whether we are to look at the marks as they will probably be used in the course of trade. Now the 6th section speaks of a trade-mark; it says that the Registrar shall not without leave register a trade-mark identical with one which is already registered, and that he shall not register with respect to the same goods a trade-mark so nearly resembling a trade-mark already on the register as to be calculated to deceive. It is to be observed that there is nothing stated there about outline or design, or form. That which is spoken of is the trade-mark, and when we come to the 10th section to see what is the definition of a trade-mark, that which is applicable to the present case is a "distinctive device or mark." There again there is nothing about form or outline, it is the trade-mark taken as a whole. That being so, and the mischief to be guarded against being a mischief to be done to one person by another in the course of trade and in the use of these marks in trade, it seems to me that it would be a narrow construction of the statute to say that we are only to look at the mark as it is printed in the advertisements, and that the proper construction is to say that we are to look at the trade-mark as it will be used in the course of trade. Now, that being so, it is obvious that there is nothing in the statute to prevent the trade-mark which is registered from being used in any colour. Therefore, it seems to me that the proper construction is that where a trade-mark is registered, it is not merely the outline or design as printed in the advertisement in black, or black and white, which is to be protected, but that which is to be protected is the trade-mark as it may be used or will be used in the ordinary course of trade, that is, in any colour. That being so, it seems to me that the proper test is this: assume both trade-marks to be registered, and let it be supposed that each person registering is ignorant of the other's trade-mark, would any fair use of the second be calculated to deceive? I quite agree that we ought not to take into consideration an obliteration or a fraudulent alteration of the second design. The question is whether any fair use of the second would be calculated to deceive. Now, if the first may be used in any colour, so also the second if registered may be used in any colour, and, supposing the parties

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to be ignorant of each other's marks, they might both with a perfectly fair intention use them of the same colour. The question would then be whether, supposing them both to be registered, and supposing them both to be fairly used with the same colour, would the second be calculated to deceive any person who only used ordinary observation? That brings us to a matter of fact to be considered in each particular case. The decision with regard to any two trade-marks cannot give any assistance as to what ought to be the decision with regard to any other two trade-marks. In each particular case you must do the best you can to come to a right decision as to what would be calculated to deceive, it being assumed that the two marks are not identical. Then one has to exercise one's own eyes. I doubt very much whether the affidavits which have been used can be used with any greater effect than the evidence of experts with regard to handwriting or other matters, that is to say, the use of them is that persons in the trade may be able to point out matters which ought to be taken into consideration. Now if these two trade-marks were kept as printed in the advertisement, I should come to the conclusion that they present so different an appearance that the second one could not be calculated to deceive, for that no one could mistake it for the first. But it seems to me that if they were not used in black and white, but the ground of each triangle was of the same colour, the second mark would be calculated to deceive. Supposing them both to be red, even as at first presented and when quite fresh, I think they might be mistaken for each other by an ordinary observer; but certainly, if the design of the second one were to be at all worn, I should say that they would present nearly the same appearance. It would not be so only in red; it would be so if they were blue, yellow, or green, or in any colour but black and white as presented on the advertisement. In my opinion these two marks are so much alike, although not identical, that the second one is calculated to deceive. Under these circumstances, according to the true construction of the statute, the second ought not to registered.

Cotton, L.J.:—

In this case, as both the Lords Justices concur with the Master of the Rolls, his decision will be affirmed, but I must say that I

entertain great doubt as to the correctness of that decision. I am glad to see that neither of the Lords Justices put their affirmance of the Master of the Rolls' decision upon the ground that the applicants intended to imitate or copy the trade-mark of Messrs. *Bass*. There seems no ground upon the evidence for that suggestion. The question which we have to consider is this, whether under the Act of Parliament the trade-mark which is proposed to be registered by Messrs. *Worthington* is so like the registered trade-mark of Messrs. *Bass* as to be calculated to deceive. Now, we must look to see what Messrs. *Bass* have registered, remembering this, that a difficulty arises from the fact that the Act of Parliament and the Rules have no regard to colour, which very often is the great mark of likeness or unlikeness. What Messrs. *Bass* have registered is a triangle black all over. I think the opinion has already been expressed that Mr. *Chitty* put his claim too high when he said that his registration would cover a checkered triangle. As I understand registration under the Act, the mark registered by Messrs. *Bass* represents something without any device placed upon it by difference of colour, because if once you say that any part of their triangle may be coloured differently from the rest of it, you get an entirely different device or mark from that which has been in fact registered, and I think, therefore, that Messrs. *Bass's* is a registration of a triangle without any device or design upon it. That would exclude from consideration those trade-marks of Messrs. *Bass* which have been produced by Mr. *Chitty*, being what I consider to be the trade-mark with a frame round it in gold similar to the lines round the inner triangle of Messrs. *Worthington*.

What do Messrs. *Worthington* propose? They do not propose to register a plain triangle, but a triangle with such distinctive marks that when printed in black and white it cannot be mistaken for that of Messrs. *Bass*. I am glad to say, that on principle there does not seem to be much difference between my own view and that which has been enunciated by Lord Justice *Brett* as to the test, namely, in a fair use of this as proposed to be registered, or in a fair print of it, is it calculated to deceive? We must judge by the eye. Evidence has been adduced that this mark might lead to deception, and that was supplemented by the allegation that Messrs.

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Bass's pale ale was called triangle ale. The only evidence of that was this, that certain orders addressed to Messrs. *Bass* so described it, and invoices so described it, but that was explained by the fact that Messrs. *Bass* have two distinct kinds of beer, *Burton* ale and pale ale, one with a lozenge and the other with a triangle, so that in writing to them pale ale might be described as triangle ale in distinction from the lozenge ale. That being out of the way, we have to look at the mark. As long as it is fairly printed, so as to bring out the church, and the label on the outer triangle round it with "*Beccles* Brewery. Established 1830," I should say there is a sufficient distinctness in the design to prevent our arriving at the conclusion that it is calculated to deceive purchasers, and to pass off *Worthington's* beer as *Bass's* beer. There is no doubt the difficulty that they are not confined to black and white or to any other colour. That is a difficulty arising from this—that the Commissioners for some reason thought there was some difficulty in having colour, and they excluded colour from their consideration in registration. My doubt is whether the other members of the Court do not rather point to mistakes occasioned by a false and fraudulent printing of the mark rather than by the use of the mark fairly printed so as still to keep the design. If it was printed in such a way as not to bring out the distinctive marks, that would not be a fair printing of it—the use of it would not be a fair use—it would not be the use of the design as registered, but the use of something else—not of the distinctive mark or device which it is proposed to register. I think, in considering whether registration of a mark ought to be allowed, we ought not to consider whether by dishonest use and dishonest printing it could be made such as to deceive, but whether, assuming that it was printed and used with the distinctive design still kept up, it is calculated to deceive from its similarity to another mark which is registered.

Of course, as the other members of the Court both agree with the Master of the Rolls, the decision will be affirmed, but I thought it right to express my views as to the principle upon which the case ought to be decided.

Solicitors: *Walter Webb; J. S. Salaman.*

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C. A.
1879
C. J. B.
Dec. 15.

C. A.
1880
Feb. 26.

Building Agreement—Forfeiture of Materials in event of Builder's Bankruptcy —Fraud on Bankrupt Law—Protected Transaction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 94.

An agreement, dated the 17th of September, 1878, between an owner of land and a builder provided that, in consideration of the rent thereby reserved and certain agreements on the part of the builder, the landowner would, as the builder should erect and completely cover in the messuages thereinafter agreed to be erected by him, demise to him a piece of land for ninety-nine years, at a yearly rent of £300. And the builder agreed to erect and completely finish forty houses, each of a specified value, within fifteen months from the date of the agreement, and vigorously and effectually to proceed continuously with all buildings once commenced by him on the ground, and to accept leases of the land and houses as the same should be erected and covered in. Until the leases should be granted the builder was to hold the premises subject to the payment of the rent, and to the observance and performance of his part of the terms and stipulations of the agreement, and subject to the power of distress and entry in default of any of the stipulations on his part, or on his becoming bankrupt or insolvent, in either of which cases all improvements, materials, and effects on the land, or adjacent thereto, which should not have been actually demised to the builder, should become absolutely forfeited to the landlord, but without prejudice to any right of action which might have accrued to him under the agreement (which was not to be construed as an actual demise), and the landlord was to be at liberty to re-enter and take possession of the ground, premises, chattels and effects, and to relet or sell the same, or otherwise to use and enjoy the same, as fully as if the agreement had never been made. In January, 1879, the builder filed a liquidation petition. At this time there was a large quantity of building materials on the land comprised in the agreement, which had been placed there by the builder. Up to the time of the filing of the petition the builder had made no default in performing his agreement:—

Held, that the provision for forfeiture of the materials to the landlord on the bankruptcy of the builder was void, as contrary to the policy of the bankruptcy law, and that the materials on the land were the property of the trustee in the liquidation.

Brown v. *Bateman* (1) and *Ex parte Dickin* (2) distinguished.

Decision of *Bacon*, C.J., reversed.

BY a memorandum of agreement dated the 17th of September, 1878, and made between *Agnes Elizabeth Meads*, spinster, of the one part, and *W. D. Harrison* of the other part, Miss *Meads*, in consideration of the rent thereby reserved and the agreements on

(1) Law Rep. 2 C. P. 272. (2) 4 Ch. D. 524.

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the part of *Harrison* thereinafter contained, agreed that she would, as *Harrison* should erect and completely cover in the messuages thereinafter agreed to be erected by him, demise to him, his executors, administrators, and assigns, certain land at *Waltham Cross*, for the term of ninety-nine years from the 29th of September, 1878, at the yearly rent of £300. And *Harrison* thereby agreed (*inter alia*) to erect, cover in, and completely finish, forty houses of the value of £150 each at the least, within fifteen months from the date of the agreement, and also that he would vigorously and effectually proceed continuously with all erections and buildings once commenced by him on the ground or any part thereof, and that he would have and accept leases of the land and houses as the same should be erected and covered in, not less than two plots of land and houses being included in each lease, except that he might take up the leases of the houses along the front or main road, including one house only in each such lease, and that he would execute counterparts of such leases. The agreement further provided that until the leases should be granted *Harrison* should "hold the premises subject to payment of the said rent and to the observance and performance of his part of the terms and stipulations aforesaid, and subject to the power of distress and entry in default of any of the stipulations aforesaid on his part or on his becoming bankrupt or insolvent, or assigning over his estate and effects for the benefit of his creditors, in either of which cases all improvements, materials, implements, plant, chattels, and effects, on the said ground or adjacent thereto, which shall not have been actually demised and leased to the said *W. D. Harrison*, shall be and become absolutely forfeited to the said *A. E. Meads*, her executors, administrators, and assigns, but without prejudice to any right of action that may have accrued to her or them under this agreement (which is not to be construed as an actual demise), and the said *A. E. Meads*, her executors, administrators, or assigns, to be at liberty to re-enter and take possession of the said ground, premises, chattels, and effects, without any formal proceeding, and to relet or sell the same to any person, or otherwise use and enjoy the same as fully as if this agreement had never been entered into." To enable *Harrison* to complete the buildings Miss *Meads* advanced him a sum of £325, to secure which, and also any further

advances, *Harrison*, on the 19th of November, 1878, executed a mortgage to her of all his right and title, &c., under the building agreement, and also assigned to her by way of mortgage all the bricks and building materials then or thereafter to be placed upon the said ground. This deed was not registered as a bill of sale.

On the 28th of January, 1879, *Harrison* filed a liquidation petition in the *Lincoln* County Court. At the time of the filing of the petition a quantity of wood, bricks, tiles, scaffolding, and other building materials, of the estimated value of £700, had been placed by *Harrison* upon the land agreed to be demised to him by Miss *Meads*, and there was due to her from him on the security of the mortgage of the 19th of November, 1878, a sum of £450.

Immediately after the filing of the petition *George Jay*, who was appointed receiver, took possession of these materials, and he continued in possession of them upon his being afterwards appointed trustee.

These materials were also claimed by Miss *Meads* by virtue of the agreement of the 17th of September, 1878. On the 10th of April, 1879, she commenced an action in the Common Pleas Division against *Jay*, to recover them or their value. It was afterwards arranged that the question whether she or the trustee was entitled to them should be determined by the Bankruptcy Court. On the 3rd of June, 1879, the trustee gave notice of motion in the County Court for an order giving him leave to disclaim the agreement of the 17th of September, 1878, and also for an order declaring that the building materials, which on the 28th of January, 1879, had been placed by *Harrison* on the land comprised in the agreement of the 17th of September, 1878, were the property of the trustee.

Harrison made an affidavit in which he said: "At or immediately after the date of the agreement of the 17th of September, 1878, I commenced to build certain messuages on the land agreed to be demised by that agreement, and from that time down to the time of filing my petition I vigorously and effectually proceeded continuously with all such messuages agreeably in all respects to the stipulations in the said agreement on my part in that behalf, and in all other respects duly observed and performed all the provisoes, stipulations, and covenants in the said agreement con-

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tained or made necessary to be observed and performed on my part."

The Judge gave leave to the trustee to disclaim the agreement, and a disclaimer was executed on the 28th of July, 1879. The Judge also, on the 14th of July, 1879, made an order declaring that the building materials in question were the property of the trustee.

From the order of the County Court Judge Miss *Meads* appealed to the Chief Judge. The appeal was heard on the 15th of December, 1879.

Nasmith, for the Appellant, referred to *Ex parte Dickin* (1); *Brown* v. *Bateman* (2); *Ex parte Stephens* (3).

Winslow, Q.C., and *Brough*, for the trustee:—

The cases cited are distinguishable.

BACON, C.J.:—

There is no such distinction as has been suggested between this case and *Ex parte Dickin*. In that case an agreement in substance like the present one was held to be a valid agreement, and not a fraud upon the bankruptcy law. Is there anything illegal in this case? The owner of the land contracts with the debtor to let the land for building purposes, and the debtor agrees to supply the necessary building materials, which are to be forfeited to the landowner if bankruptcy should occur before the completion of the contract. Under the contract it was necessary that the debtor should bring in materials, and the parties agree that, until the leases shall be granted, that is, until the houses are built, a certain state of things shall exist—the materials are to be employed in building the houses; but, if the contract is broken, then the whole thing is to become null and void, and the materials are to become forfeited to the landowner. Is there anything unlawful in that? Is it not a perfectly good and valid contract? The debtor says in effect, "If I become bankrupt, that which is mine shall become yours." There is no objection to such a contract as

(1) 4 Ch. D. 524. (2) Law Rep. 2 C. P. 272.
(3) 7 Ch. D. 127.

that. He became bankrupt, and thereupon the rights of the landowner took effect and the materials became his property. The doctrine of order and disposition has no application to the case. There was no fraud, but a transaction perfectly consistent with the speculation into which both parties had entered, that the materials brought upon the land were to be used in constructing the buildings. The trustee cannot take advantage of one part of the agreement and disclaim the other. The debtor was the holder of the land, and would have been entitled to hold it as against an execution creditor. Are the trustee's rights greater than the rights of an execution creditor? The trustee owns all the estate of the bankrupt. The principle is the same as that laid down in *Brown* v. *Bateman* (1), the agreement in that case being substantially the same as that in *Ex parte Dickin* (2), where it was held to be a perfectly valid agreement. The order which has been made against Miss *Meads* cannot be sustained; she is entitled to the materials, and an order to that effect must now be made.

From this decision the trustee appealed. The appeal was heard on the 26th of February, 1880. C. A.

Winslow, Q.C., and *Brough*, for the Appellant:—

The agreement amounts in effect to this, that the materials are to remain the property of the builder until he becomes a bankrupt, and on his bankruptcy they are to become the property of the lessor. Such an agreement is void, as being contrary to the policy of the bankruptcy law: *Ex parte Mackay* (3); *Whitmore* v. *Mason* (4).

[JAMES, L.J., referred to *Ex parte Williams* (5).]

Brown v. *Bateman* is distinguishable. There was no bankruptcy there, and the agreement was that all materials brought upon the premises should be considered as immediately attached to and belonging to the premises, and that no part should be

(1) Law Rep. 2 C. P. 272.
(2) 4 Ch. D. 524.
(3) Law Rep. 8 Ch. 643.
(4) 2 J. & H. 204.
(5) 7 Ch. D. 138.

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removed therefrom without the lessor's consent. And it was held that this stipulation gave the lessor an equitable interest in the materials, so that they were not liable to be seized under an execution against the builder. *Ex parte Dickin* (1) is also distinguishable, for there the agreement was to erect a house on land belonging to a club, not on the builder's own land, and the club seized the materials without any notice of an act of bankruptcy committed by the builder.

At any rate, if the materials were the property of the lessor before the filing of the petition, they were in the debtor's order and disposition with her consent.

Nasmith, for the lessor:—

The trustee cannot both disclaim the agreement and rely on its provisions. The transaction is protected by sect. 94, unless the agreement is clearly invalid. The agreement was made in good faith, and regard must be had to its whole scope and intention. The forfeiture arises "in default of any of the stipulations" on the part of the debtor. If at the date of the petition there had remained very little to be done by him to complete the buildings, the trustee could have claimed the benefit of the contract. The moment the debtor failed in fulfilling any of his stipulations, the materials, by virtue of the contract, vested in the lessor; the addition of a provision as to bankruptcy was unnecessary, and cannot affect the validity of the provision for forfeiture in case of default. If the trustee had chosen to complete the contract, there would have been no default; he could have used the materials in question for the purpose of completing. The trustee had a right to insist on performing the contract.

Winslow, in reply:—

Either there was a default by the debtor before the petition, or there was not. If there was, the materials became at once the property of the lessor, and she allowed them to remain in the debtor's order and disposition. If there was not, then the lessor's right to the materials arose only in consequence of the bankruptcy, and such a provision is void.

(1) 4 Ch. D. 524.

JAMES, L.J.:—

The case has been very well argued. But it appears to me that it is governed by the decisions of this Court in *Ex parte Mackay* (1) and *Ex parte Williams* (2), which only followed much older decisions. The principle of those decisions is this, that a simple stipulation that, upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy should go over to some one else and be taken away from his creditors, is void as being a violation of the policy of the bankrupt law. Now that we have all the facts before us, I think we cannot escape from applying that principle to the present case. According to the debtor's own evidence everything that he was bound to do under the agreement had been performed by him up to the date of the bankruptcy, and therefore no right was vested in the lessor except by virtue of the bankruptcy. Her title is founded only on the stipulation that in the event of the builder's bankruptcy the materials which had been placed on the land should become her property. It seems to me impossible to distinguish the case from those authorities to which I have referred.

BRETT, L.J.:—

According to the agreement the forfeiture of the materials was to take place on the happening of two events: 1. the builder not completing the buildings according to his agreement; 2. his becoming bankrupt. With regard to the first, Mr. *Nasmith* has certainly raised a very ingenious argument. He said that the trustee might have elected to fulfil the contract, and that if he had done so and had continued the works there would have been no default in performing the stipulations of the agreement, and, therefore, no forfeiture. But, he said, the trustee had elected not to fulfil the agreement, and the forfeiture took place by reason of that election, and there was no forefeiture by reason of the bankruptcy. It is a very ingenious argument, but there is this difficulty in the way of it, that the trustee had really no power to elect to fulfil the contract, because on the bankruptcy the lessor had a right to take possession of the land, and, if she did so, the

(1) Law Rep. 8 Ch. 643. (2) 7 Ch. D. 138.

C. A. 1880 *Ex parte* JAY. *In re* HARRISON.

trustee could not complete the buildings. This ingenious problem need not be solved on the present occasion. It appears that there was no default on the debtor's part up to the filing of the petition, and the Respondent cannot, therefore, succeed except by virtue of the provision for forfeiture on bankruptcy, and according to the authorities such a stipulation is void.

The appeal must, therefore, succeed.

COTTON, L.J.:—

I am of the same opinion. This case is governed by the decision of Lord *Eldon* in *Higinbotham* v. *Holme* (1), that there cannot be a valid contract that a man's property shall remain his until his bankruptcy, and on the happening of that event shall go over to some one else, and be taken away from his creditors. Here the forfeiture is to take place on the happening of either of two events. There is no stipulation as to the mode in which the lessor shall use the materials when they become forfeited to her. One of the two events is not hit by the decided cases. But, as to the other, though the contract is good as between the parties to it, it is on principle void in the event of the builder's bankruptcy. In *Brown* v. *Bateman* (2), the principle of the decision was this, that the Court considered the effect of the contract was to give the landlord from the very time when the contract was entered into an equitable interest in the chattels, and therefore the case was not within the principle of *Higinbotham* v. *Holme*. The decision of the Chief Judge in *Ex parte Dickin* (3) seems to have proceeded on the same principle. His view of the facts, whether right or wrong, was this, that a lien on the chattels in question had been given to the landlords from the very commencement of the contract, and that though a power was given to them to seize the chattels in the event of the bankruptcy of the builder, it was only given in consequence of the interest which had been previously vested in them. The present case cannot be brought within the principle of those cases. There is no stipulation that advances are to be made by the lessor to the builder, in respect of which she was to have a

(1) 19 Ves. 88. (2) Law Rep. 2 C. P. 272.
(3) 4 Ch. D. 524.

lien on the materials. We must, therefore, hold that the materials have become the property of the trustee.

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Solicitors for Appellant: *Clarkson, Son, & Greenwell*, agents for *Grange & Wintringham, Grimsby.*

Solicitors for Respondent: *Lewis & Sons.*

Applied. *Re* SCHOLFIELD (*decd.*). [1949] 1 All E.R. 490.

Followed. *Re* SCHOLFIELD. [1949] 1 Ch. 341

ASKEW *v.* WOODHEAD.

[1873 A. 15.]

C. A. 1879 V.-C. B. *Nov.* 22. C. A. 1880 *March* 3.

Lands Clauses Act, 1845, *ss.* 74, 80—*Leaseholds—Compulsory Sale—Tenant for Life and Remainderman—Benefit of Tenant for Life in the Proceeds of Sale—Costs.*

Petitioner was entitled for life under a marriage settlement to leaseholds, which had eight years to run. The trustees of the settlement had power to sell the leaseholds with his consent, which he declined to give. The leaseholds were taken under the powers of the *Lands Clauses Act*, and the proceeds of sale were paid into Court, and invested. The purchase-money was sufficient to provide an annuity for eight years of much larger amount than the net annual proceeds of the leaseholds:—

Held, by *Bacon*, V.C., that the Petitioner was entitled out of the income, and by sale from time to time of the capital, of the investment, to an annuity for a period corresponding to the residue of the term, of the same amount only as the average net annual proceeds of the leaseholds before sale.

Held, by the Court of Appeal, that the Petitioner was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run.

A contest between the tenant for life and remainderman as to how much of the fund belonged to one of them and how much to the other:—

Held, by *Bacon*, V.C., to be a litigation between adverse claimants within sect. 80; but this decision was disapproved of by *Jessel*, M.R.

17 Ch D 332
18 Ch D 631
21 Ch D 229

BY a marriage settlement dated in 1844, leaseholds at *Sheffield*, the property of the intended wife, were assigned to trustees, upon trust, with the consent in writing of the wife during her life, and after her death, with the consent of the husband during his life, to sell, and to invest the residue of the sale moneys, and pay the income to the wife during her life for her separate use, and after her decease, to the husband, for his life, and after the determination of those interests, upon the trusts therein mentioned. There

and see Re Walker 18 Ch D 597 7th

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was the usual provision that until sale the rents should be applied as income of the trust fund.

The wife died in 1872 without issue. In 1873 a decree was made for executing the trusts of the settlement.

By a certificate made in the suit dated the 12th of December, 1876, it was certified that part of the settled property consisted of leaseholds the term of which would expire on the 29th of September, 1886, and that the husband objected to these leaseholds being sold. The average net annual income of the leaseholds was £137 0*s.* 6*d.*

In the year 1877 the Corporation of *Sheffield*, the urban authority for the borough of *Sheffield* under the powers of the *Public Health Act*, 1875, which incorporates the *Lands Clauses Act*, bought these leaseholds for £1550, and on the 3rd of September, 1878, an order was made for the corporation to pay this sum into Court to the credit of the cause, *ex parte* the corporation, and that the same when paid in should be invested in consols.

In July, 1879, the husband presented a petition asking that, without prejudice to any question as to the ultimate adjustment of the rights and interests as between the Petitioner and the persons entitled in remainder, so much of the fund in Court as with the dividends would raise the yearly sum of £137 might be sold, and such yearly sum paid to the Petitioner.

The petition came on to be heard on the 2nd of August, 1879, when Vice-Chancellor *Bacon* made an interim order that the arrears of dividends and future dividends should be paid to the Petitioner, and that the corporation should pay the costs up to that time, the rest of the petition standing over. On the 3rd of November the petition was brought on again, and stood over, that the Petitioner might amend it. It was amended by stating that by the calculation of an actuary the exact amount of an annuity which being paid in equal half-yearly instalments extending over the term which the lease had to run at the date of the purchase would exhaust the fund in Court, supposing the price of consols to be 94½, was £218 15*s.* 8*d.*, and by asking that this yearly amount, instead of £137, might be raised and paid to the Petitioner. On the 22nd of November the petition came on to be finally disposed of.

Hemming, Q.C., and *G. C. Price*, for the Petitioner :—

If the Court should not see fit to act upon the report already made, we are ready to submit to a reference to an actuary, as directed by Lord *Romilly*, M.R., in *In re Phillips' Trusts* (1).

We ask for costs against the urban authority on the authority of *Haynes* v. *Barton* (2).

T. H. Robertson, for the remainderman :—

This property was converted from the moment the settlement was executed. It became money at that date, and has continued ever since to be money in equity : *Lechmere* v. *Earl of Carlisle* (3) ; *Costello* v. *O'Rorke* (4) ; *Wrightson* v. *Macaulay* (5) ; *Battest* v. *Maunsell* (6).

The consequence is that the intervention of the *Public Health Act*, with compulsory powers of taking land, has no effect on the nature or character of the property in the view of this Court; and the provisions of the *Lands Clauses Act* as to the reinvestment of leaseholds in other leaseholds have no application : *In re Taylor's Settlement* (7).

The Petitioner might have given his consent to a sale. If he had done so, we should clearly have been entitled to the capital of the proceeds in remainder, whether the Petitioner's death were to take place before the expiration of the term or afterwards. He would have got the income for his life, long or short, and we should have had the capital in remainder. The effect of a compulsory sale by force of the statute is precisely the same as would have been the effect of a sale with the Petitioner's consent. The statute supplies the consent; or it overrides the refusal to consent. It follows that the Petitioner is entitled only to the dividends of the fund in Court for his life. At the utmost he can take no more than an annuity of £137 0*s.* 6*d.* for the residue of the term.

Ingle Joyce, for the urban authority :—

The Court will not order us to pay the costs of this discussion,

(1) Law Rep. 6 Eq. 250.
(2) 1 Dr. & Sm. 483.
(3) 3 P. Wms. 211.
(4) 3 L. R. Ir. Eq. 172.
(5) 4 Hare, 487.
(6) 10 L. R. Ir. Eq. 97.
(7) 9 Hare, 596.

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which is clearly adverse litigation. On a former occasion we asked to be dismissed on payment of costs up to that date, but the application was refused, the question of costs being reserved.

Owen, for the trustees of the settlement.

Hemming, in reply:—

The intention of the Legislature was to give to the tenant for life and the remainderman respectively the same interest in the fund, relatively to each other, as they had in the original property.

The Petitioner, if he lives for eight years, would have been entitled to the whole of these leaseholds. Only in the event of the Petitioner's death before September, 1886, would the remainderman have taken anything. Why should the Petitioner's interest be lessened by reason of the compulsory sale? No doubt the value of the property has become increased, but why should the remainderman reap the whole of the benefit of such increase, and the tenant for life take none? The increment ought to be rateably apportioned between the tenant for life and the remainderman. When the 74th section speaks of "the same benefit" it means the same proportional benefit.

In *In re Phillips' Trusts* (1) the Court directed a reference to an actuary. No reference to an actuary would have been necessary if all the Court had to do was to give the tenant for life no more than he had before, no matter how much the property had increased in value.

The principle contended for was followed in *In re Money's Trusts* (2).

As to the costs, it cannot be said that this discussion is adverse litigation. The title to the leaseholds is not questioned. There was no dispute until the urban authority came and took the land. Their action has given rise to the contest. Nobody disputes that the tenant for life and remainderman are entitled between them to the whole—the only question is, in what shares are they entitled?

(1) Law Rep. 6 Eq. 250. (2) 2 Dr. & Sm. 94.

BACON, V.C.:—

The rights of the parties are to be ascertained from the statute, and the Act of Parliament alone is what I have to look to. The property in question was a leasehold estate, in which the Petitioner had an interest for life. The property has been sold and has realized £1550. The Act of Parliament says (sect. 74):

"Where any purchase-money . . . shall have been paid in respect of any lease for a life or lives, and years . . . it shall be lawful for the Court . . . to order that the same shall be laid out, invested, accumulated and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease . . . in respect of which such money shall have been paid, or as near thereto as may be."

Mr. *Hemming* argues that the tenant for life is entitled, for a period corresponding to the rest of the term, to an annuity which, if he lives, will consume the whole of the £1550. But to give him that would not be to give him "the same benefit" as he might have had from the lease, but another and a different benefit. Mr. *Hemming's* argument is, that the statute means that a man who is entitled to, and has hitherto been receiving £137 0*s.* 6*d.* a year, is henceforward to receive £218 15*s.* 8*d.* a year.

The decision in *In re Phillips' Trusts* (1) has been referred to. The case is very shortly stated:—[His Lordship read the report and continued:—]

And that is supposed to be an authority in support of Mr. *Hemming's* argument.

There may be cases in which it is necessary to refer to the report of an actuary. But no such case presents itself here. The amount of income to which the Petitioner is entitled is clearly defined, and to supply so much of that income as the dividends fail to yield, there must be a sale of stock from time to time. But then the whole income is to be no more than the Petitioner formerly received. That is what the justice of the case requires; and it will carry out the statutory requirement.

I make no reference to the circumstance that the consent of the Petitioner was necessary to a conversion of the property. The

(1) Law Rep. 6 Eq. 250.

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vis major of the statute supersedes any necessity for consent on the part of the Petitioner.

The costs of the petition must be according to the Act; but with regard to the present hearing, the urban authority must not be compelled to pay the costs of this contention, which is most clearly an adverse litigation. The parties must bear their own costs of this hearing; but the other costs of the hearing, including those of the trustees not already provided for, will come out of the fund.

The order, after stating the opinion of the Court that the Petitioner was entitled to the same income and no more out of the capital and income as he received from the rents of the leasehold, proceeded to provide for payment of arrears of income up to the 29th of September, 1879, at the rate of £137 per annum, and to direct that on and after the the 25th of March, 1880, and the 29th of September, 1880, and on and after the same days in each succeeding year until and including the 29th of September, 1886, provided the Petitioner should so long live, the half-yearly payment of £68 10*s.* should be raised and paid to the Petitioner. The corporation were ordered to pay the costs of the petition up to and including the order of the 2nd of August, 1879, but the subsequent costs of the Petitioner were given out of the fund.

C. A.

The Petitioner appealed from this order, but did not serve the appeal on the corporation. The appeal was heard on the 3rd of March, 1880.

Hemming, Q.C., and *G. C. Price*, for the Appellant:—

This is the first occasion on which this question has come before the Court of Appeal. The mode in which it has been dealt with by the Courts of first instance has not been uniform, but latterly the understanding of the profession has been that the course adopted in *In re Phillips' Trusts* (1) is the proper course. This in substance converts the purchase-money into an annuity, having the same number of years to run as the leasehold, and gives the successive takers the same benefits relatively to each other as they would have had if the leasehold had remained.

(1) Law Rep. 6 Eq. 250.

[JESSEL, M.R.:—I have repeatedly made orders on that principle. If a leasehold could be purchased having the same number of years to run as the leasehold which has been taken, the Court would invest the money in purchasing it. If the leasehold had not been taken, and the tenant for life had survived the term, the remainderman would have taken nothing. How then, in that event, can he be entitled to receive any of the purchase-money?]

Eddis, Q.C., and *T. H. Robertson*, for the remainderman:—

The leasehold was settled in trust for sale, subject to the consent of the tenant for life, which he would not give. Then a *vis major* intervenes, and the property is converted and brought into the same position as if the trust for conversion had been exercised. The absence of consent does not prevent the Court from selling: *Lechmere* v. *Earl of Carlisle* (1). The property then having been converted, the proceeds ought to be dealt with as under the trust for sale, the *vis major* having removed the check imposed by the consent being required.

[JESSEL, M.R.:—The Court did not direct a sale. There cannot be any conversion for this purpose without consent.

BRETT, L.J.:—The case surely must turn on the Act. As no consent was given the trust for sale appears to be out of the case.]

In the cases in which there has been a reference to an actuary, the purchase-money was so small that the tenant for life would have lost income: *Re Burtt* (2); *In re Phillips' Trusts* (3).

[COTTON, L.J., referred to the order in *In re Phillips' Trusts*; *Seton* on Decrees (4).

JESSEL, M.R.:—That order was no doubt drawn up by arrangement, the tenant for life waiving the benefit of the decision, which often happens where the case is between parent and child.]

In *In re Pfleger* (5) the Court did not proceed on the principle now contended for. The object of giving the tenant for life a

(1) 3 P. Wms. 211.
(2) 10 Jur. (N.S.) 873.
(3) Law Rep. 6 Eq. 250.
(4) 4th Ed. p. 1435.
(5) Law Rep. 6 Eq. 426.

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veto on conversion was to prevent his losing income by a sale, and the Vice-Chancellor's order gives him that advantage.

JESSEL, M.R. :—

The question before us is, what is the proper construction of the 74th section of the *Lands Clauses Consolidation Act*, 1845. [His Lordship read the section.] I will first consider the simple case of a leasehold settled upon a person for life, with a limitation over on his death to another person absolutely. When a property so circumstanced is purchased by a company, what mode of dealing with the purchase-money will give the parties interested the same benefit as nearly as may be as they would have had from the lease? This result would clearly be attained by investing the money in the purchase of an annuity having as many years to run as there were years remaining in the term, and by paying it to the tenant for life, and after his death, if the tenant for life dies within the term, then to the remainderman. Generally an annuity cannot thus be purchased which will bring in as large an income as the leasehold, but sometimes it can. The same principle, however, must apply whether the income is more or less. If an annuity is not actually bought it must be referred to an actuary to calculate what yearly sum, if raised out of the dividends and corpus of the fund, will exhaust the fund in the number of years which the lease had to run, and the amount so ascertained must be paid to the tenant for life.

In the present case an ingenious argument has been drawn from the form of the settlement. To a person not a lawyer it would seem that there was a conversion, for there is an assignment in trust for sale and a declaration of the trusts of the proceeds of sale, with a direction that until sale the rents are to go in the same way as the income of the fund would have gone if the sale had been effected. That does not to the mind of a lawyer import conversion, for there is no conversion till the consent of the tenant for life is obtained, and until that time the rights of the parties are the same as if the leasehold had been simply given to one for life with remainder over. The result is that it must be referred to an actuary to ascertain what yearly payment will exhaust the fund by Michaelmas, 1886, and that

yearly sum must be paid to the tenant for life until further order.

BRETT, L.J.:—

Although there have been many decisions on the effect of the 74th section of the *Lands Clauses Act*, this is the first time that its construction has been before the Court of Appeal. The leasehold having been converted into money under the powers of the Act, the Court has to deal with the money so as to give the parties as nearly as may be the same benefit as they would have had from the lease. The object of the statute evidently is to substitute the money for the lease, and give the parties interests in the money corresponding to their interests in the lease. This can only be done by converting the money into an annuity which will last as long as the lease, and by paying the annuity to the person who would for the time being have been entitled to the possession of the leasehold. There is nothing in the Act which authorizes us to say that the tenant for life is only to have the same income as before.

COTTON, L.J.:—

The question that first arises in this case is whether the fund is to be dealt with on the footing that the property has been converted under the settlement or under the Act. The tenant for life not having consented to a sale, the sale cannot be treated as having been made under the trusts of the settlement, and the order under appeal does not so treat it, for it gives the tenant for life more than the income arising from the investment of the purchase-money. Mr. *Eddis* argues that the trust for sale ought to be taken into account, but unless we can treat the property as sold under the trust for sale we must treat it as a leasehold taken under the powers of the Act. Now the Act does not say that the tenant for life is to have the same income as before, but that all the parties interested are as nearly as may be to have the same benefits as before. The only way of accomplishing this is to convert the fund into an annuity having the same duration as the lease, and to pay it to the person who would have received the rents of the leasehold. If the tenant for life outlives the term he gets all, if not, he gets a proportion during his life and the

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remainderman gets what remains. This gives all parties the same benefits as they would have obtained from the lease, so far as it is possible to do so. The decision in *In re Phillips' Trusts* (1) is in accordance with our view, for we must look, not to the order, which no doubt was taken by arrangement, but to the judgment. In *In re Pfleger* (2) Vice-Chancellor *Giffard* directed an annuity to be purchased for the life of the petitioner, so as to give her the same income as before, but as she thus received more than she would have received if the fund had been invested in an annuity to last as long as the term, the case decides nothing in favour of the Respondents. But however that may be, we have only to decide according to what appears to us to be the true construction of the Act.

JESSEL, M.R. :—

As the corporation is not here, we cannot alter the order of the Vice-Chancellor as to costs, but in my opinion the costs which his Lordship has ordered to be paid out of the fund were not costs of adverse litigation. Adverse litigation arises where different parties set up adverse titles to the estate. Here the title was not in dispute, and these costs are costs arising in the course of administering the purchase-money under the Act, and ought, in my opinion, to have been paid by the corporation.

Solicitors for Petitioner: *Pilgrim & Phillips.*
Solicitors for Remaindermen: *Frere & Co.*
Solicitors for Trustees: *Geare & Son.*
Solicitors for Urban Authority: *R. Smith & Wilmer.*

(1) Law Rep. 6 Eq. 250. (2) Law Rep. 6 Eq. 426.

Ex parte GRIFFIN. *In re* ADAMS.

C. A.
1880
March 4.

Practice—Costs—Set-off—Court of Bankruptcy—Bankruptcy Rules, 1870, *rr.* 186, 188.

The Court of Bankruptcy will not allow costs of proceedings in the High Court to be set off against costs of proceedings in bankruptcy.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge.

On the 27th of May, 1878, *C. J. Culley* presented a bankruptcy petition against *A. W. Adams*, founded upon a judgment debt of £1876 17*s.*, which had been recovered by *Margaret Edenborough* in an action in the Queen's Bench Division against *Adams*, and afterwards assigned by her to *Culley*. The petition was, on the 11th of July, 1878, dismissed by the Court of Appeal, on the ground that *Culley* was a mere trustee for *John Griffin*, who was the absolute beneficial owner of the debt, and that the petition could not be sustained unless both trustee and *cestui que trust* joined in it. (*Vide Ex parte Culley* (1).)

On the 20th of September, 1878, *Culley* assigned the judgment debt to *Griffin*, and he, on the 4th of March, 1879, presented a bankruptcy petition in respect of it against *Adams*. This petition was dismissed by Mr. Registrar *Murray* on the 1st of April, 1879, with costs to be paid by *Griffin*, on the ground that it had been presented for an inequitable purpose, and on the 17th of July, 1879, an appeal from this decision was dismissed by the Court of Appeal, with costs to be paid by *Griffin*. (*Vide Ex parte Griffin* (2).)

Before the judgment debt had been assigned by *Culley* to *Griffin*, *Adams* had made an application to the Queen's Bench Division to set aside the judgment. This application was refused, with costs to be paid by *Adams* to *Culley*. The costs were taxed at the sum of £47 16*s.* 6*d.* The costs payable by *Griffin* to *Adams*, under the orders of the 1st of April, 1879, and the 17th of July, 1879, were taxed at the sums of £171 11*s.* 11*d.* and £72 14*s.* 11*d.* respectively. *Griffin* applied to the Bankruptcy

(1) 9 Ch. D. 307. (2) 12 Ch. D. 480.

C. A. 1880 *Ex parte* GRIFFIN. *In re* ADAMS.

Court for an order that he might be at liberty to set off the £47 16*s.* 6*d.* against the two sums of £171 11*s.* 11*d.* and £72 14*s.* 11*d.* He deposed that on the application to the Queen's Bench Division to set aside the judgment, it was he who in fact supported the judgment and on whose behalf the costs were incurred, and that he had paid or agreed to pay the costs of the solicitors who acted nominally for *Culley* on that occasion. The Registrar on the 2nd of December, 1879, refused the application. *Griffin* appealed.

Sir *H. Jackson*, Q.C., and *R. Vaughan Williams*, for the Appellant:—

The set-off ought to be allowed. *Adams*, who opposed *Culley's* petition on the ground that *Griffin* was the beneficial owner of the debt, cannot be heard now to say that the debt belonged to *Culley*. And, if the debt was the property of *Griffin*, the costs of resisting the application to set aside the judgment ought to be paid to him; he has the beneficial right to receive them. In *Watson* v. *Mid-Wales Railway Company* (1), it was held that after an equitable *chose in action* had been assigned the debtor could not set off against the assignee a debt which had accrued due to him from the assignor after notice of the assignment, even though it had resulted from a contract entered into previously. That case was before the *Judicature Act*, and now the Court always has regard to the beneficial ownership.

[JAMES, L.J.:—The equitable owner of costs is the solicitor who has conducted the litigation.]

Griffin is bound to pay whatever costs *Culley* has incurred in the proceedings. *Adams* got rid of *Culley's* petition on the very ground that *Griffin* was the beneficial owner of the debt; how can he, when the pay day comes, be heard to say that the costs due to him from *Griffin* shall not be paid out of a debt which he owes to *Griffin*?

[JAMES, L.J.:—Suppose a trustee fails in a litigation; is there any equity entitling the *cestui que trust* to interfere with the payment of costs?]

(1) Law Rep. 2 C. P. 593.

The Court regards the equitable ownership for the benefit of the equitable owner; it should do so equally in respect of the burden.

Formerly, at Common Law, a set-off of costs was allowed when the person who had to pay costs in one action had sued in that action on behalf of the person who in another action was entitled to receive costs from him: *O'Connor* v. *Murphy* (1); *Nunez* v. *Modigliani* (2). And in some of the Common Law Courts, costs in a Common Law action were allowed to be set off against costs in the Court of Chancery; though a set-off of a judgment debt against costs in bankruptcy was not allowed, but that was only on the ground that the application ought to be made to the Court of Bankruptcy; *Archbold's* Practice (3); *Harrison* v. *Bainbridge* (4); *Hall* v. *Ody* (5); *Emdin* v. *Darley* (6); *Webber* v. *Nicholas* (7); *Woodroffe* v. *Wootton* (8).

Pollard, for *Adams*:—

The order for payment of the costs of the application to set aside the judgment was made against *Culley*. Till his petition was presented *Adams* did not know that he was not the beneficial owner of the debt. This application for a set-off, if well founded, might have been made on *Culley's* petition. *Culley* paid the costs of that petition. There being no bankruptcy and no estate to administer, the Court of Bankruptcy has no jurisdiction to do what is asked. Such a set-off as is asked for has never before been allowed by the Court of Bankruptcy.

Sir *H. Jackson*, in reply:—

There is no more reason why costs in the Queen's Bench Division should not now be set off against costs in the Court of Bankruptcy than there was formerly for not setting off costs in one Common Law Court against costs in another Common Law Court.

[JAMES, L.J.:—In *Wright* v. *Mudie* (9) it was held that the

(1) 1 H. Bl. 657.
(2) Ibid. 217.
(3) 13th Ed. vol. i. p. 643.
(4) 2 B. & C. 800.
(5) 2 B. & P. 28.
(6) 1 B. & P. (N.R.) 22.
(7) 4 Bing. 16.
(8) 6 L. J. (C.P.) 176.
(9) 1 S. & S. 266.

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Court of Chancery would not allow costs of a suit to be set off against costs of an action between the same parties.]

There is no reason why this Court should not follow the practice of the Common Law Courts. Rules 186 and 188 of the Bankruptcy Rules, 1870, give the Court of Bankruptcy a large power as to costs.

JAMES, L.J.:—

The Court of Bankruptcy has never made such an order as is now asked for; certainly the Court of Chancery would not have done so in the time of Lord *Eldon*. In *Hall* v. *Ody* (1) Lord *Eldon*, then Chief Justice of the Common Pleas, said (2): "Finding it to be the practice of this Court that an attorney shall not take his costs out of the fund which by his diligence he has recovered for his client, where the opposite party is entitled to a set-off, it does not become me to say more than that I find it to be the settled practice with much surprise, since it stands in direct contradiction to the practice of every other Court, as well as to the principles of justice. In the Court of Chancery the same parties are often concerned in many suits, and I never knew the idea entertained of arranging the funds till the respective attorneys were paid their costs. However, as the attorney in this case has acted with a knowledge of the settled practice of the Court, he can have no right to claim the advantage of a more just principle; and it will only remain for the Court to consider whether the practice of the Court of King's Bench should not be adopted here for the future." That was Lord *Eldon's* view when the set-off of costs would interfere with the solicitor's lien, which it always must do. It is laid down in distinct terms that the Court of Chancery would not allow the costs of an action in the Court of King's Bench to be set off against the costs of a suit in the Court of Chancery. The Court of Bankruptcy has always followed the practice of the Court of Chancery in this respect, and I think we ought to act on this settled principle, and not to allow costs in another Court to be set off against costs in the Court of Bankruptcy. Lord *Eldon* thought that a set-off of costs ought not to

(1) 2 B. & P. 28. (2) 2 B. & P. 29.

be allowed to the prejudice of the attorney's lien, and of course it must necessarily prejudice his lien.

The appeal will be dismissed.

BRETT and COTTON, L.JJ., concurred.

C. A.
1880
Ex parte GRIFFIN.
In re ADAMS.

Solicitor for Appellant: *J. C. E. Weigall.*
Solicitor for Respondent: *P. Collings.*

Ex parte NELSON. *In re* HOARE.

C. A.
1880
March 4.

Bankruptcy—Secured Creditor—Sequestration—Chose in Action—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16—*Rules of Court*, 1875, *Order* XLII., *rr.* 1, 2, 4, 20; *Order* XLVII.

The mere issuing of a writ of sequestration against a Defendant and the service of it on a debtor to him, or a trustee of a fund for him, without anything further being done to render the sequestration effectual against the debt or fund, is not enough to make the Plaintiff a secured creditor of the Defendant within the meaning of the *Bankruptcy Act*, 1869.

Whether a writ of sequestration can be properly issued to enforce a simple judgment for a debt, or to enforce an order upon a judgment debtor's summons, *quære.*

17 L.D. 2d
483.
18 L.D. 65

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

On the 14th of February, 1879, *Edward Hunt* recovered judgment in two actions which he had brought in the Exchequer Division against *Thomas Hoare*, respectively for two sums of £73 3*s.* 4*d.* and £72 9*s.* 4*d.*

Hoare was, under the will of a Mr. *Chapman*, entitled to a legacy of £300, part of which had been paid to him by *Chapman's* executors, but the balance of the legacy remained in their hands. On the 15th of February, 1879, notice of the two judgments was given to the executors. On the 22nd of February, 1879, the debts not having been satisfied, *Hunt* issued a judgment debtor's summons, under sect. 5 of the *Debtors Act*, 1869, against *Hoare*, calling upon him to appear before a Judge in Chambers to be examined as to his means of payment, and also to shew cause why he should not be committed to prison for his default in payment.

C. A. 1880

Ex parte NELSON. *In re* HOARE.

The hearing of this summons was several times adjourned, and ultimately it was adjourned for four days.

On the 9th of June, 1879, *Hunt* issued two writs of sequestration out of the Exchequer Division against *Hoare*, founded on the two judgments respectively. The writs were in the form No. 10 given in Appendix F. to the Rules of Court, 1875. Notice of these writs was given to the solicitors of the executors of *Chapman*, and copies of the writs were served on them. On the 9th of August, 1879, the solicitors of the executors wrote a letter to the solicitors of *Hunt*, in which they admitted that the executors had in their hands to the credit of *Hoare* on account of the legacy a sum of £118 17*s.* 7*d.* On the 29th of October, 1879, *Hunt* issued a summons in the two actions in the Exchequer Division, calling upon *Hoare* to shew cause why he should not be restrained from receiving the £118 17*s.* 7*d.* admitted to be due and payable to him by the executors of *Chapman*, and why the sequestrators should not receive that sum from the executors, and why on receiving it the sequestrators should not pay it to *Hunt*. The hearing of this summons was adjourned to the 4th of November. On the 3rd of November *Hoare* filed a liquidation petition, and on the same day a receiver was appointed, and an injunction was granted by the Court of Bankruptcy restraining further proceedings in *Hunt's* actions. On the 20th of November *Richard Nelson* was appointed trustee under the petition. He claimed from the executors of *Chapman* the balance of the legacy which remained in their hands. That balance had then become reduced to £85. It was also claimed on behalf of *Hunt*, on the ground that, by the issue of the writs of sequestration, and the notice of them which had been served on the executors, *Hunt* had, before the liquidation petition was filed, become a secured creditor of *Hoare*. The money was in the hands of the solicitors to the executors, and they on the 26th of November, in answer to a letter which had been written to them by the trustee's solicitors, wrote as follows:—"The executors are ready to pay the trustee the balance, less any expenses proper to be allowed them, with the consent of the sequestrators, or upon being satisfied the trustee can give a good discharge notwithstanding the writs of sequestration." The trustee then applied to the Bankruptcy Court for an order declaring that he was entitled to

the £85, and restraining *Hunt* from interfering with the receipt of it by him. The Registrar was of opinion that *Hunt* was a secured creditor of *Hoare*, and refused the application.

The trustee appealed.

Winslow, Q.C., and *S. Woolf*, for the Appellant:—

The practice of the old Court of Chancery as to writs of sequestration is made applicable to the High Court by Order XLVII.

[BRETT, L.J.:—Does the present case come within the Order?]

We say that it does not. There has been no judgment ordering the debtor to do any act within a limited time; an order on a judgment debtor's summons is not a judgment. The process of sequestration was not intended to be used to enforce a judgment for the payment of a debt. The payment of a sum of money was not enforced in this way in the Court of Chancery: *Seton* on Decrees (1).

[BRETT, L.J., referred to Order XLII.]

But, if the sequestration was properly issued, still it was not a security on the debtor's property till something more had been done. The executors could safely have paid the money to the debtor himself: *Willcock* v. *Terrell* (2); *Crispin* v. *Cumano* (3); *Wilson* v. *Metcalfe* (4). The Respondent had obtained no charge or lien on the property of the debtor before the petition was filed within the meaning of sect. 16 of the *Bankruptcy Act*, 1869. *Ex parte Joselyne* (5), which may be cited against us, depended on the express provision of rule 3 of Order XLV., that service of a garnishee order on the garnishee shall bind the debts in his hands due to the judgment debtor. There is no similar provision as to a sequestration.

[JAMES, L.J., referred to *Ex parte Williams* (6).]

Till the money is charged in the hands of the person who holds it, he has a right to pay it to the person for whom he originally

(1) 4th Ed. vol. ii. p. 1577, *et seq.*
(2) 3 Ex. D. 323.
(3) Law Rep. 1 P. & M. 622.
(4) 1 Beav. 263.
(5) 8 Ch. D. 327.
(6) Law Rep. 7 Ch. 314.

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held it: *Johnson* v. *Chippindall* (1). Even if an order had been made to restrain the debtor from receiving this money, that would not prevent the trustee from receiving it. It would still be his property.

Horton Smith, Q.C., and *Mears*, for the Respondent:—

The Respondent had done all he could to enforce his sequestration. The executors had admitted that they had a balance in their hands belonging to the debtor, and had in effect attorned to the sequestrators. It may be that an order could not have been made on them without their consent to pay the money to the sequestrators, but they have admitted the title of the sequestrators. The only question is between them and the trustee in the liquidation. The executors have recognised the writ of sequestration, and the Respondent has become a secured creditor. Whether the writ was properly issued is immaterial, for its validity has never been disputed till now. If it was disputed, the proper course would have been to apply to the Court to set it aside. A writ of sequestration operates as a charge on the Defendant's property: *Ward* v. *Booth* (2); *Burdett* v. *Rockley* (3). In *Ward* v. *Booth* it was held that the sequestrators had priority over a mortgage subsequently created by the defendant. In *Wilson* v. *Metcalfe* (4), the sequestrators had permitted or recognised payment of the annuity to the defendant, but an order was made for payment of the annuity to the sequestrators for the future. The principle of the decision in *Ex parte Joselyne* (5), which went further than *Emanuel* v. *Bridger* (6), was that the creditor had done all he could to enforce his order. In the present case the Respondent has done all he could do. The same principle is recognised in *Hamer* v. *Giles* (7); *In re Stanhope Silkstone Collieries Company* (8). *Crispin* v. *Cumano* (9) is distinguishable, for there the bank had been warned that the registered owner of the stock was only a trustee of it. It has been held that a writ of foreign attachment in the Mayor's Court

(1) 2 Sim. 55.
(2) Law Rep. 14 Eq. 195.
(3) 1 Vern. 58.
(4) 1 Beav. 263.
(5) 8 Ch. D. 327.
(6) Law Rep. 9 Q. B. 286.
(7) 11 Ch. D. 942.
(8) Ibid. 160.
(9) Law Rep. 1 P. & M. 622.

of the City of *London* gives a security to the creditor who has issued it: *In re London Cotton Mills Company* (1); *Levy* v. *Lovell* (2); though, no doubt, those decisions are under appeal. *Ex parte Evans* (3) is another illustration of the principle.

JAMES, L.J.:—

It appears to me that the Respondent has entirely mistaken his course of procedure, and that he ought not to have issued a writ of sequestration. Assuming, however, that the writ was perfectly valid (though I am bound to say that on the facts before us, there being a simple judgment for a sum of money, I cannot understand how the writ could have been issued), it did not create any charge on this particular fund. The giving of notice of a general sequestration to a debtor to the defendant against whom it has been issued does not create a charge on the particular debt or fund any more than the delivery of a writ of *fi. fa.* to the sheriff creates a charge on any particular goods of the judgment debtor which the sheriff might seize under it. This Court held in *Ex parte Williams* (4) that, until a writ of *fi. fa.* has been executed by seizure, the judgment creditor has acquired no security on the property of the judgment debtor. So in the case of a writ of sequestration, there must have been something done to fix on some particular property of the defendant. If a debtor to him has not attorned to the plaintiff who has issued the sequestration, there is not sufficient to make him a secured creditor of the defendant. Until something has been done to enforce it against some particular property, a writ of sequestration stands in the same position as a garnishee order till it has been served on the garnishee. The two things, as it seems to me, are identical. A garnishee order which has not been served on the garnishee does not create a charge on the debt due from him to the judgment debtor; and just in the same way, a mere general writ of sequestration is not sufficient to give to the plaintiff who has issued it a good title to any particular property of the defendant as against the trustee in the defendant's bankruptcy.

(1) 25 W. R. 109.

(2) 11 Ch. D. 220. The decision in *Levy* v. *Lovell* was reversed by the Court of Appeal on the 8th of March, 1880.

(3) 13 Ch. D. 252.

(4) Law Rep. 7 Ch. 314.

C. A.

1880

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BRETT, L.J.:—

I am of the same opinion. The question is whether within the meaning of sub-sect. 5 of sect. 16 the Respondent had before the filing of the liquidation petition obtained a charge or lien on this particular fund, supposing that it was still in the hands of the testator's executors. It appears to me that the mere issue of a writ of sequestration did not charge the legacy in the hands of the executors. I have very great doubts whether the writ was properly issued at all under a mere ordinary judgment for a debt. But, as it has not been questioned, as no application has been made to set it aside, we must for the present purpose assume that it was properly issued. But the writ was only issued, and notice of it was given to the executors, or, as it is said, it was served on the executors. I know of no legal effect which results from that notice or service. It must be taken that there has been simply the issue of the writ, for there is no statutory enactment that the issue of the writ shall bind any particular debt due to the defendant. It seems to me that the case cannot be put higher than the delivery of a writ of *fi. fa.* to the sheriff, and it was decided in *Ex parte Williams* (1) that a writ of *fi. fa.*, unless there has been a seizure under it, is not valid as against the trustee in bankruptcy of the judgment debtor. The case of *Ward* v. *Booth* (2) seems to me to be an authority against the Respondent, for there the Master of the Rolls thought that to charge the property of the defendant something more must be done than the issue of a writ of sequestration, and that the suit was necessary in order to make the sequestration a charge on his property.

The cases relating to garnishee orders and foreign attachments in the Mayor's Court of *London* do not seem to me to help the Respondent. Indeed those upon garnishee orders seem to me to be against him, because it has been held that the issue of a garnishee order, without service on the garnishee, is not enough to create a charge on the debt in the hands of the garnishee. In the *Common Law Procedure Act* of 1854 there was an express enactment that service of the garnishee order upon the garnishee should bind the debts in his hands due to the judgment debtor,

(1) Law Rep. 7 Ch. 314. (2) Law Rep. 14 Eq. 195.

and that provision is now contained in Order XLVII.; and that no doubt created a charge on those debts as against the trustee in bankruptcy of the judgment debtor. And, as to foreign attachment in the Mayor's Court, having regard to the fact that the decision in *Levy* v. *Lovell* (1) is now under appeal, it would not be right to say more than this, that the most which it establishes is this, that if the writ of attachment is issued and is served, the service has the same effect as the service of a garnishee order under the *Common Law Procedure Act*, unless the parties who are entitled to appear in the Mayor's Court do appear and shew that the writ was improperly issued. None, therefore, of those cases in any way assist the Respondent; and it appears to me that we must hold that the mere issue of a writ of sequestration, without something more being done to enforce it, creates no charge on a particular debt due to the Defendant.

COTTON, L.J.:—

It is contended that the Respondent had prior to the filing of the liquidation obtained a charge on part of the property of the debtor within the meaning of sect. 16 of the *Bankruptcy Act*. A good deal of argument has been addressed to the question whether the sequestration was under the circumstances properly issued. I think it is unnecessary, and that it would be improper, to give any opinion on that question now, for it is not really open for our consideration. It must not, however, be assumed that, if the question had been open, I should have considered that the writ had been properly issued. But, assuming that it was properly issued, it is said that the mere notice of it to the executors created a charge on the fund in their hands. I am of opinion that it did not. By virtue of the writ the sequestrators could have seized any property of the Defendant upon which they could have laid their hands without committing a breach of the peace, and without legal process. But the fund here in question is a *chose in action* which could not be recovered without some legal process. Is a charge on a fund in that position created by merely giving notice of a sequestration? In my opinion it would be contrary to all legal principle to hold that it is. In order to create a charge the

(1) 11 Ch. D. 220.

C. A. 1880 *Ex parte* NELSON. *In re* HOARE.

Plaintiff must, in my opinion, either have obtained an injunction to restrain the Defendant from receiving the fund, as in *Willcock* v. *Terrell* (1), or must have brought an action, as in *Wilson* v. *Metcalfe* (2), to make the sequestration effectual, *i.e.*, to do something which the writ itself did not do. *Ward* v. *Booth* (3) is an authority against the Respondent. It was a suit for the purpose of making a sequestration effectual against a *chose in action* of the plaintiff's debtor. She had, after the issue of the writ, mortgaged the *chose in action* to a defendant who took with notice of the writ. The Master of the Rolls held that the mortgage was inoperative against the plaintiff, not on the ground that the plaintiff had a prior charge, but on the ground that the mortgage was an attempt by the debtor, in collusion with the mortgagee, to prevent the sequestration being enforced, and therefore could not stand in the way of the plaintiff's rights. In *Ex parte Joselyne* (4) we were dealing with the case of a garnishee order under rule 3 of Order XLII., which expressly says that service of the order on the garnishee shall bind in his hands the debt due from him to the judgment debtor. It was argued that something further was necessary to make the order effectual, and the judgment of the Court was that, though something further was required as against the garnishee, nothing more was necessary as against the judgment debtor. As against him the order became absolutely effectual from the time of service on the garnishee, and from that time the judgment creditor held security on the property of the judgment debtor. In the present case nothing had been done before the filing of the liquidation petition to make the sequestration effectual as against this fund, and therefore nothing had been done to make the Respondent a secured creditor of the debtor.

Solicitors for Appellant: *Prockter & Andrews.*
Solicitors for Respondent: *Learoyd, Learoyd, & Peace.*

(1) 3 Ex. D. 323.
(2) 1 Beav. 263.
(3) Law Rep. 14 Eq. 195.
(4) 8 Ch. D. 327.

In re ROBERTS.
GOODCHAP *v.* ROBERTS.

[1877 R. 14.]

C. A.
1880
March 3, 10.

Covenant to pay Money on a Day certain—Interest—Rate of Interest.

By a mortgage deed reciting an agreement for an advance at £10 per cent. the mortgagor covenanted for payment of the principal sum at the expiration of twelve months, and for the payment of interest in the meantime at the rate of £10 per cent. per annum, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for repayment. The money was not repaid on the day, but interest at £10 per cent. was paid for several years. The mortgagor having died, and a decree having been made for administration of his estate, the mortgagee proved as a creditor for the principal sum and interest:—

Held, that interest was recoverable only as damages, and ought to be limited to £5 per cent.

BY an indenture of mortgage dated the 20th of January, 1868, made between *Jackson* and *Roberts* of the first part, *Duncan* of the second part, and *Berridge* of the third part, reciting that *Jackson* and *Roberts* had requested *Berridge* to lend them the sum of £5000 at interest at the rate of £10 per cent. per annum, which he had consented to do upon having the same secured by the joint and several covenant for payment thereof by the parties thereto of the first and second parts respectively, and by such mortgage or other assurance being made or effected in his favour of the mortgage security thereinbefore recited as was made or expressed to be made in and by the now stating indenture, *Jackson*, *Roberts*, and *Duncan*, in consideration of £5000, with the privity and approbation of *Duncan*, advanced by *Berridge* to *Jackson* and *Roberts*, jointly and severally covenanted with *Berridge* that they or some or one of them, their or some or one of their heirs, executors, or administrators, would, on the 20th of July, 1868, pay to *Berridge*, his executors, administrators, or assigns, the sum of £250, being half a year's interest on the £5000, and would, on the 20th of January, 1869, pay to *Berridge* the sum of £250, being a further half-year's interest, and also the principal sum of £5000, making together £5250.

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C. A. 1880 — *In re* ROBERTS. GOODCHAP *v.* ROBERTS.

By the same indenture *Jackson* and *Roberts* assigned to *Berridge* a sum of £8000 due to them on mortgage, subject to the proviso for redemption contained in the now stating deed; also demised to him certain leasehold property comprised in their mortgage for all the residue of the terms vested in them except the last two days, subject to the proviso for redemption thereinafter contained. There was a proviso for redemption in case of the parties of the first and second parts, or any of them, making the before mentioned payments to *Berridge*, his executors, administrators, or assigns, at the times and in manner mentioned in the foregoing covenant. The deed contained no covenant for payment of interest in the event of the £5000 remaining wholly or in part unpaid after the day named for its repayment.

The sums of £250 and £250 were paid on the 20th of July, 1868, and the 20th of January, 1869, but no part of the principal was repaid. Interest at £10 per cent. was paid on the £5000 down to the 20th of July, 1871.

In February, 1877, *Roberts* being dead, a judgment was given for the administration of his estate. *Berridge* carried in a claim as a creditor for £5000 and interest. The executors set up a deed of release executed by *Berridge*, who replied that the release had been delivered as an escrow, and was only to have effect on the fulfilment of certain conditions which had not been fulfilled. The Chief Clerk of Vice-Chancellor *Bacon* certified that no debts of the testator remained unpaid. *Berridge* applied to vary this certificate, and the application was refused by the Vice-Chancellor, who was of opinion that the release was effectual. *Berridge* appealed, and the Court of Appeal, taking a different view of the evidence from the Vice-Chancellor, held that the release had not come into operation, and that *Berridge* was a creditor for £5000 and interest. The Court having delivered judgment to this effect,

Sir *H. Jackson*, Q.C., and *Morshead*, for the Plaintiff, and *Kay*, Q.C., and *McCullagh*, for *Roberts*:—

Interest after the first year can only be given at £4, not at £10, per cent.: *In re European Central Railway Company* (1).

(1) 4 Ch. D. 33.

[JESSEL, M.R.:—That is quite a different case; it was held that the debt was merged in the judgment.]

Cook v. *Fowler* (1) is decisive on the point that interest at £10 per cent. does not run on. The interest after the year is not under the contract, but by way of damages for breach of the contract, and interest at such a rate as £10 per cent. will not be given.

Hemming, Q.C., *Horne-Payne*, and *Hornell*, for *Berridge*:—

The proper measure of damages for non-payment on the day is the rate of interest which the parties themselves have fixed before the day. This is the general rule, which is never departed from except under very special circumstances.

[JESSEL, M.R.:—I think that would be so if the rate of interest named by the parties was below £5 per cent., but I know of no authority which says that more than £5 per cent. will be given by way of damages.]

The reason of the rule applies as much to one case as to the other. Moreover, in the present case the agreement is expressly recited to be for a loan at £10 per cent.

Cook v. *Fowler* is the only reported case in which this rule as to the measure of damages has been departed from, and it only shews that the general rule may yield to very exceptional circumstances. There is no suggestion there that the rule is to apply only to cases where the interest is not more than £5 per cent., or that it can be modified in any case where an express agreement as to interest is recited.

JESSEL, M.R.:—

The question before us arises on the proof of debt by a creditor in an administration suit. The case stands on the same footing as if this was an action on the covenant in the mortgage deed, and we are now really sitting as a jury to assess the damages for breach of covenant in not paying £5000 on the day named in the covenant. The agreement was to pay 10 per cent. up to a certain day, and then to pay £5000, and the only point we have to decide

(1) Law Rep. 7 H. L. 27.

C. A. 1880 *In re* ROBERTS. GOODCHAP *v.* ROBERTS.

is, what is the proper amount of damages for the non-payment of that debt. Now in an action at law for the non-payment of money on a day certain, where it is an interest-bearing debt the rule has always been to recommend the jury to give 5 per cent., because that is the usual commercial value of money. If there ever should come a time when it fell very much, juries might give less, or if it rose very much they might give more, but that is the reason of the rule. The fact of the parties having bargained for a higher or a lower rate of interest for a time certain is always to be taken into consideration as shewing the value of money, but it does not decide the question. It appears to me that no jury would give more than 5 per cent. in such a case as this, and sitting as a jury we ought not to give more.

BRETT, L.J.:—

I am of the same opinion, and for the same reasons.

COTTON, L.J.:—

I am of the same opinion; and it is only necessary for me to add that we are not deciding now what rate of interest should be allowed in a suit for redemption, but simply on an action brought for breach of covenant to pay the money on a given day.

Solicitors: *M. K. Braund; Willoughby & Cox.*

BOYES *v.* COOK.

C. A.
1880
March 12.

[1876 B. 37.]

*Will—Appointment by general Bequest—Power created subsequently to the Will —Contrary Intention—*1 *Vict. c.* 26, *ss.* 24, 27.

By a separation deed *A.* settled his property, reserving to himself a general power of appointment by will over one-third of it, and declaring the trusts of the remaining two-thirds for his wife and children. By his will, executed several months previously to the separation deed, *A.* devised and bequeathed all his property to trustees upon trusts for his wife and children:—

Held (reversing the decision of *Malins*, V.C.), that the will was a good execution of the power: and that the settlement and the circumstances under which it was executed could not be looked at to shew a contrary intention.

In re Ruding's Settlement (1) questioned.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The suit was instituted for the administration of the trusts of a separation deed executed by *T. B. Boyes* and his wife.

On the 24th of October, 1860, *T. B. Boyes* made his will, whereby he devised and bequeathed all his real estate and the residue of his personal estate to his wife *Elizabeth Boyes*, *H. Cook*, and *A. Pickering*, upon trust to sell and convert the same into money, and to stand possessed of the proceeds upon trust to invest the same and to pay the annual income to his wife during her life or widowhood, and after her decease or second marriage, in trust for his children in manner therein mentioned.

After the date of his will differences arose between the testator and his wife and they agreed to live separate, the wife taking the care and maintenance of the children.

A separation deed was executed on the 10th of April, 1861, whereby the testator conveyed all his real and personal property to trustees upon trust to sell and convert the same into money, and to hold the proceeds upon trust to pay one-third of the income to the testator during his life, and after his death to stand possessed of one-third of the capital in trust for such per-

(1) Law Rep. 14 Eq. 266.

C. A. 1880 BOYES v. COOK.

sons and for such intents and purposes as he should by his last will or any codicil thereto direct or appoint, and in default of such direction or appointment, upon the same trusts as were thereinafter directed respecting the other two-thirds of the trust funds, which were for the benefit of the children.

The testator died in 1875, without having revoked or altered his will, and the question arose in the suit on further consideration whether the residuary gift in the will operated as an execution of the general appointment reserved in the subsequent separation deed.

The case came on for further consideration before Vice-Chancellor *Malins* on the 23rd of July, 1878, when his Lordship, following his own decision in *In re Ruding's Settlement* (1), held that there was sufficient in the surrounding circumstances to shew a contrary intention on the part of the testator within the meaning of the 27th section of the *Wills Act* (1 Vict. c. 26), and that the will did not operate as an execution of the power in the deed.

From this decision the trustees of the separation deed appealed.

J. Pearson, Q.C., and *Cozens-Hardy*, for the Appellants:—

A will containing a general gift of property is a good execution of a general power of appointment under the 1 Vict. c. 26, ss. 24, 27, although the power was created after the date of the will: *Stillman* v. *Weedon* (2); *Thomas* v. *Jones* (3); *Hodsdon* v. *Dancer* (4). In order to prevent the bequest from operating as an execution of the power, a contrary intention must appear in the will; the surrounding circumstances cannot be taken into account *In re Ruding's Settlement* was not rightly decided, for in that case the Vice-Chancellor presumed a contrary intention from the surrounding circumstances. In *Moss* v. *Harter* (5) a contrary intention appeared on the will itself. In the present case there is nothing in the will to shew a contrary intention, and there is no other property which the testamentary gift can affect, so that unless it operates as an execution of the power there will be an intestacy as to one third of the estate.

(1) Law Rep. 14 Eq. 266.
(2) 16 Sim. 26.
(3) 2 J. & H. 475.
(4) 16 W. R. 1101.
(5) 2 Sm. & Gif. 458.

Simmonds, for the testator's widow, supported the appeal. He referred to *Scriven* v. *Sandom* (1).

C. H. Turner, for the Plaintiff, who was one of the testator's children:—

It is impossible to construe the will without looking at the settlement to see if the power is properly executed: and when you look at the settlement it is clear that the testator did not intend the will to be an execution of the power. If any part of the settlement is looked at the whole must be considered. The two instruments must be read together; and if this is done it is clear that the object of the settlement will be frustrated if the will should operate as an execution of the power. This is sufficient to shew that the testator had no intention that his will should have any such effect. The will was in effect partially revoked by the deed.

S. Hallett, and *Marcy*, for the other children.

JAMES, L.J.:—

Notwithstanding the decision of the Vice-Chancellor in *In re Ruding's Settlement* (2)—which case, as at present advised, I find it very difficult to distinguish from the present, and if it be necessary to overrule that decision it must be overruled on the principle I am about to enunciate—I am of opinion that the decision appealed from cannot be sustained. The 24th section of the *Wills Act* enacts that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and then the 27th section says, that a general devise or bequest of real or personal estate shall be construed to include any real or personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. Taking these two sections together, it is clear that a will containing a general devise or bequest, and made before the

(1) 2 J. & H. 743. (2) Law Rep. 14 Eq. 266.

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creation of a general power to appoint by will, and remaining unrevoked until the testator's death, is a good execution of the power. In fact a general power of appointment really confers on the donee of the power the entire beneficial interest in the property subject to the power, and enables him to dispose of it as he pleases. In *In re Ruding's Settlement* (1) the Vice-Chancellor held that the surrounding circumstances could be looked at in construing the will. But when it is said that surrounding circumstances may be looked at, that only means that the circumstances existing at the time when the testator made his will may be looked at. You may place yourself, so to speak, in his arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention. But to look at a settlement subsequently executed is not to look at the surrounding circumstances which existed when the will was made. In my opinion we cannot look at the differences which arose subsequently between the testator and his wife, for the purpose of saying that the deed of separation operated as a partial revocation of the benefit conferred on the wife by the will. We cannot look at the separation deed for the purpose of construing the will. I think, therefore, that the decision of the Vice-Chancellor must be reversed.

BRETT, L.J.:—

It appears to me that *Thomas* v. *Jones* (2) rightly decided the meaning of the Act of Parliament, and laid down a general rule which should be followed in all cases. I confess I cannot follow the reasoning of the Vice-Chancellor in *In re Ruding's Settlement*. But assuming that there are special circumstances in that case which may support that decision, there appear to me to be no such special circumstances in the present. Therefore, even supposing *In re Ruding's Settlement* was rightly decided, I think it is no authority in favour of the decision in the present case.

COTTON, L.J.:—

I also agree that the decision of the Vice-Chancellor in this case cannot be supported. The 24th and 27th sections of the *Wills*

(1) Law Rep. 14 Eq. 266. (2) 2 J. & H. 475.

Act lay down a general rule for these cases; and the Vice-Chancellor, in *In re Ruding's Settlement,* did not dispute that general rule. He says there (1): "Upon the general question I intend to raise no doubt that a will containing a general bequest of property under the 27th section of the *Wills Act* passes all property which the testator had at the time of his death, including all the property over which he has a general power of appointment, whether the general power was created before or after the date of the will. Upon that subject I must be understood as not raising the slightest doubt." And then he goes on to deal with what he considered the special circumstances of that case. Now the 27th section of the Act says that a general bequest shall operate as an execution of a general power of appointment unless a contrary intention shall appear by the will. In my opinion that section applies, unless a contrary intention appears by the will, whether the will is made before or after the creation of the power. We have to look only at the will for a contrary intention, and the distinctions made by the settlement cannot be said to be a contrary intention appearing by the will. I think it is settled that where a general power to appoint by will is created after the execution of a will containing a general bequest, the testator must be taken to have known that his will would operate as an execution of that power unless he altered his will. That being so, there is nothing on the face of this will to shew that it should not operate as an execution of the power given by the settlement. I am, therefore, of opinion that this appeal must be allowed.

Solicitors for Appellants: *Munton & Morris.*

Solicitors for Respondents: *R. Hewlett; Lewis & Indermaur; Saunders & Baker.*

(1) Law Rep. 14 Eq. 272.

C. A.
1880
March 12, 13.

ATTORNEY-GENERAL *v.* TOMLINE.

[1878 A. 105.]

Foreshore—Removal of Shingle—Injury to neighbouring Landowner—Duty of Crown to protect the Realm.

It is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers; and therefore no subject is entitled to destroy a natural barrier against the sea. And if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it.

In an action by the owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the Defendant, the owner of the foreshore, from removing shingle therefrom, so as to expose the Plaintiff's land to the inroads of the sea; although the shingle was removed for sale in a natural and ordinary user of the land.

The decision of *Fry*, J., affirmed.

THIS was an appeal from a judgment of Mr. Justice *Fry* (1).

The matter came before the Court on an action in the nature of an information by the Attorney-General on behalf of the Crown, and an action by the Secretary of State for the War Department, as Plaintiff, against Colonel *George Tomline*, the lord of the manor of *Felixstowe Priory*, in the county of *Suffolk*.

The statement of claim alleged that the Plaintiff was seised in fee simple, in trust for the Queen, of certain land situate near *Felixstowe Priory*, which formed the site and inclosure of a martello tower known as the *U Tower*. The east side of this land immediately adjoined the seashore in the estuary and near the mouth of the River *Deben*. The Defendant was lord of the manor, and as such claimed to be owner of the foreshore. The eastern portion of the Plaintiff's land lay very low, and was frequently below the level of the sea at high water in spring tides. A shingle bank on the beach formed a natural barrier which protected the land from the sea, and was the only barrier which prevented the sea from encroaching on the Plaintiff's land. The Defendant had for some years past sold to ship-masters and other persons large quantities of the shingle from the beach for ballast; and the

(1) 12 Ch. D. 214.

Plaintiff alleged that in consequence of the removal of the shingle, the north-east corner of the Plaintiff's land was in immediate danger of being flooded, and if the removal of the shingle was continued the whole natural barrier of shingle would be destroyed, and the Plaintiff's land would be washed away, and the stability of the martello tower endangered. The informant and Plaintiff, therefore, claimed an injunction to restrain the Defendant from removing the shingle.

The Defendant in his defence claimed the right to remove the shingle from the foreshore as lord of the manor; but he denied that the exercise of his rights in the removal of the shingle would affect the natural bank of shingle, or that it would leave the Plaintiff's land unprotected from the sea, or would endanger the stability of the martello tower.

The Defendant also denied that the Queen, either in right of her prerogative or as a landowner, had any right to maintain the suit.

The facts and effect of the evidence are fully stated in the previous report.

At the trial Mr. Justice *Fry* granted an injunction restraining the Defendant from so digging or removing, or authorizing to be dug or removed, any shingle from the natural barrier of shingle as to endanger the Plaintiff's land, and expose it to the inroads of the sea.

From this judgment the Defendant appealed.

Cookson, Q.C., and *Hadley*, for the Appellant:—

The Plaintiff's evidence is insufficient to shew any present injury or any danger of future injury to the land. The Defendant claims to exercise his right to the foreshore in a natural and legitimate way. The taking away of the shingle from time to time and selling it for profit is a legitimate use of it. If his neighbour is injured by his doing so, there is no right of action. A man may take all the coal from under his own land, if he does so in the ordinary course of mining, although by so doing he may drown his neighbour's mine: *Smith* v. *Kenrick* (1); *Wilson* v. *Waddell* (2). There is no liability on the Defendant to protect

(1) 7 C. B. 515. (2) 2 App. Cas. 95.

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his neighbour from the sea: *Hudson* v. *Tabor* (1). The Plaintiff can get no assistance from joining the Attorney-General in the action. An individual who has no right of action himself cannot invoke the royal prerogative to assist him. The prerogative can only be exercised for the benefit of the public, and in the present case no public injury is alleged. Indeed, the Plaintiff does not himself in the pleadings rely on the prerogative, but rests his case on his possessory title to the land.

Sir *H. Giffard*, S.G., and *Rigby* (Sir *J. Holker*, A.G., with them), for the Crown:—

It is true that we rest our case, not on the Queen's prerogative, but on the title of the Secretary of State to the martello tower and inclosure; but the question of prerogative incidentally arises in the action. We do not say that the Plaintiff is in a better position than any private individual, but the duty which lies on the Crown to protect the realm from the sea renders the act of the Defendant, by which the natural barrier against the sea is interfered with, a wrong: *The Case of the Isle of Ely* (2). If this foreshore were in the possession of the Crown it would be a violation of duty for the Crown to remove it, and the Defendant cannot do what the Crown could not do. Therefore, the act being wrongful, any individual who is injured has a right to the protection of the Court. The evidence is clear that the Plaintiff's land has been imperilled by the acts of the Defendant, and he claims to continue such acts as his right. It is also proved that this shingle is a natural barrier defending that part of the coast from the sea; if it were removed, a large tract of land would be flooded.

Hadley, in reply.

JAMES, L.J.:—

I am of opinion that the judgment of the learned Judge ought to be affirmed.

Upon the question of fact the learned Judge arrived at the conclusion, as warranted by the evidence, that the bank in question had been substantially interfered with by the acts of

(1) 2 Q. B. D. 290. (2) 10 Rep. 141, a.

the Defendant, and that those acts had resulted in an appreciable injury to a particular part of the land, and he was further of opinion (as it appears to us rightly) that the Defendant was claiming as of right to continue to do that which he had done, notwithstanding the consequences of the act upon the adjoining lands of the Plaintiff. For this purpose it need not be considered whether it is the land of the Crown or anybody else's land. That is not material. He was of opinion, therefore, that sufficient facts had been established in evidence to prove an intention on the part of the Defendant to do that which would continue the injury and which would conduce to damage and injury to the owner of the adjoining land, and that therefore it was a fit case for the interference of the Court by way of injunction to restrain him from doing that which would be a nuisance to his neighbours (for that is the extent of the injunction), if he were minded so to do, and that therefore there was a proper case established in point of fact and in point of claim on the part of the Plaintiff to warrant the Court determining, as between the Plaintiff and the Defendant, the question of right.

The learned Judge was of opinion that there was a right on the part of the landowners within this natural barrier, this natural wall of shingle, to have that wall preserved from actual wilful injury or trespass by anybody, and the learned Judge put it as derived from the prerogative of the Crown. He used the word "prerogative," but it appears to me (and the Solicitor-General accepts the suggestion) that the word prerogative in the context was not an accurate or an appropriate term—at least that it was not the most accurate or appropriate term to be used. I should not myself use the word "prerogative," but the way in which the learned Judge substantially put it may be shortly stated thus—That it is a part of the duty of the Crown of *England* to protect the realm of *England* from the incursions of the sea by appropriate defences; and certainly, if that was part of the duty of the Crown, it was no less the duty of the Crown to protect the realm by leaving unimpaired the natural defences which already existed from time immemorial and probably from periods of remote geological antiquity, than to protect it by artificial defences when artificial defences were required. And the learned Judge further held that,

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it being the duty of the Crown to protect this bank (and it appears to me the learned Judge was quite right in so holding), the bank itself was under the safeguard of the Royal authority, or Royal prerogative, in this sense, that any person removing this bank, which existed naturally so as to prevent or interfere with the performance by the Crown of this public duty, would be committing a wrongful act. It would be as much a wrongful act of a person to wilfully destroy the natural bank which the Crown was bound to protect and maintain, as it would be a wrongful act of any person to interfere with the artificial barrier which the Crown might out of its own revenues have set up by the erection of a sea-wall. It would be a wrongful act to interfere with that which it would be the duty of the Sovereign to maintain, a wrongful act which might result in a damage to a person who was entitled to the protection of the Crown and who was entitled to call upon the Crown to protect his land from the inroads of the sea. It would be a wrongful act done in the nature of a nuisance, and the person who suffered the particular damage occasioned by the nuisance would have a right to call upon the Court to interfere for his protection. Another view of it may be this: When the land was the land of the Crown, as all land in the country was, or is presumed in point of law to have been at one time, beyond all question it would have been a wrong on the part of the Crown wilfully to have removed this barrier. When the land was transmitted by grant to a subject the subject could not do that which would have been a wrongful act on the part of the Crown if the land had remained in possession of the Crown. That appears to me to be the train of reasoning by which the learned Judge arrived at the conclusion at which he did arrive in this case, and in which I entirely concur. With regard to any legal principle derived from the consideration of the original possession of property in the Crown—the original obligation of the Crown—I should myself say that, upon common principles of law, where there is such a natural protection as this—a barrier against the encroachments and inroads of the sea—any person who wilfully removes that natural barrier so as to occasion damage to his neighbour, would be guilty of a nuisance, and if a nuisance, it would be one which would give a right of action to the person who suffered from it.

Now the defence substantially raised is this. It was a defence raised something by way of analogy to what was supposed to have been decided in the case of *Smith* v. *Kenrick* (1), that is to say, the Defendant says: "It is very true that if I remove the shingle to a certain extent you will suffer by it. By natural causes the shingle has been created, and only by natural causes. The sea at different times throws up the shingle there, sometimes removing it and sometimes bringing it there, but in the result it leaves upon my land a great body of shingle, which, although varying in quantity, has a permanent existence there. It is true that that was done by the natural action of the sea. Then, if I remove it, that natural cause will produce exactly the same effect upon your lands: therefore all that I do is this, I leave you to deal with the sea as a sort of common enemy. I am not obliged to protect you from the common enemy, I have done that which on my own land I had a right to do, and if the result is that you are exposed to that which is the common enemy, you must take your own course—put a wall up or do whatever you like, or leave the sea to come on to your land, and you suffer the damage from natural causes, or would have suffered from natural causes if I had not chosen to work my own property in my own way. That, I say, is exactly what was determined in the case of *Smith* v. *Kenrick*, that if water flows from my property on to your land you must take the consequences and protect yourself in the best way you can."

Now, in my opinion, there really is no practical or useful analogy between such a case as the case of *Smith* v. *Kenrick* and the case which is before us. In the case of *Smith* v. *Kenrick*, and in the other case of *Chasemore* v. *Richards* (2), the Court was dealing with an occult course of water oozing through crevices, if they were crevices, or probably more generally oozing through pores in the bowels of the earth, coming nobody knows whence, and finding its way nobody knows how into the subterraneous workings. Now, the legal rights and liabilities flowing out of such an occult course of subterraneous waters appear to me to throw no light whatever upon such a thing as this, the existence of a great visible bank operating as a protection against the visible waves of the

(1) 7 C. B. 515. (2) 2 H. & N. 181; 7 H. L. C. 349.

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sea and the inroads of the ocean, which, through its coming in there, are liable to work destruction by inundation or otherwise.

It appears to me that this is too remote to afford us any analogy, and that the case of *Smith* v. *Kenrick* (1) affords no sort of justification for the claim of the Defendant. Under these circumstances, I think the judgment of the learned Judge in the Court below ought to be affirmed.

BRETT, L.J.:—

I also think that the judgment ought to be affirmed, and for the reasons given by the learned Judge.

I confess I think that he has, with great care and with remarkable skill, brought out the only principle upon which the judgment can properly be founded. I think it is a difficult case, and I think that the rule which he has enunciated and which he has applied has not, so far as I know, been before this laid down or applied by any Court.

Now I take the facts to be clearly proved in this case, and the material facts to be considered seem to me to be these: The Defendant is the owner of a shingle bank, which bank is on the borders of the sea, and it is a bank which, although it shifts from time to time by the action of the sea, did always, if left alone, practically form a protection to a part of the kingdom which stood behind; and the Defendant has for his own purposes used his own land in one sense in the natural mode of using that land. He has taken away from time to time a part of the shingle bank in order that it might be sold or used for ballast on board ship. *Primâ facie* he has done nothing which as the owner he would not have a right to do, and I should say that he has done nothing which he would not now have to a very great extent a perfect right to do. But he has carried on this operation on his own land to such an extent that, approximately, if he went on he would take away from the land behind this bank the natural protection against the sea which that bank gives. So that if he continued the same operation the whole of the bank, or so much of it would be taken away as to allow the sea to pass on to the land of this martello tower and a part of the adjacent country—that is to say, he has so

(1) 7 C. B. 515.

used this bank that if he continued to use it in the same way there would be great danger of the sea breaking through upon the land which is the subject-matter of the suit, and upon other adjacent lands. Then the Defendant asserted that what he was doing, and what he might do if he continued, would be done as a matter of right.

Now, that being the state of the facts, the first difficulty which presents itself is this, that this land belonging to the Defendant is not in the position of a servient tenement. There is no private right of the holders of this land of the martello tower over the land of the Defendant by way of having a right of servitude and protection. The bank is a protection not only to the land which is the subject-matter of this suit, but to other land. The Defendant is in possession of this bank as his own property, and although this bank is a protection to the Plaintiff's land, yet it it seems to me that the case of *Hudson* v. *Tabor* (1) is a binding authority upon us to say that there was no obligation on the part of the Defendant to keep up this bank, so that if the sea by any change of the formation of the adjacent land or otherwise had been found to be wearing away this protecting bank so that it would have been apparent to everybody that immediately, unless something were done, the sea would break through the bank, it seems to me that the Defendant, the owner of that bank, would be under no obligation whatever to keep the sea out; and that even though it might have been said that he was not using ordinary care, or even though it could be said that he wilfully stood by and saw the sea washing away the bank so as to endanger the land behind it, he would not have been bound to do anything.

Therefore it comes to a nice point. There is no dominant right of the Plaintiff over the land of the Defendant. There is no obligation on the Defendant to keep the sea out, and therefore the question comes to this, whether one can find any principle upon which, although he is not bound to keep the sea out, yet he must not do an act which will let the sea in. I think there is such a principle, and that it is the principle which has been enunciated by the learned Judge, and the principle upon which he has acted.

(1) 2 Q. B. D. 290.

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Now the learned Judge has used the word "prerogative." I think I can see how he arrived at the use of that word. It is said by Lord *Coke*, who is a great authority, in the case of the *Isle of Ely* (1), that by the Common Law "the King ought of right to save and defend his realm as well against the sea as against the enemies that it should not be drowned or wasted"; that is to say, there is a duty on the King, by reason of his being King, to defend his realm, and therefore of course all his realm and every part of his realm against the sea, so that no part of his realm should be drowned or wasted by the sea. Now when that was declared in a declaratory statute (23 Hen. 8, c. 5), the way in which it was introduced was this, "for that by reason of our dignity and prerogative royal" (there is the use of the word prerogative) "we are bound to provide for the safety and preservation of our realm of *England*." I take it that the use of the word "prerogative" there means the prerogative of being King, and that by reason of the prerogative of being King there is a correlative duty, and that the correlative duty by reason of his being King includes, as Lord *Coke* has said, the duty to save and defend the realm from the encroachments of the sea.

Now, I confess to my mind that is a duty of what is called imperfect obligation. Supposing that the King were to neglect that duty, I know no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty, but there is that duty of imperfect obligation on the part of the Royal authority, and that duty on the part of the King gives a corresponding right to the subject; but inasmuch as the duty of the King seems to me to be a duty of imperfect obligation, the right of the subject is also an imperfect right. It is a right which as against the Crown the subject has no means to enforce: nevertheless the right exists. The right of the subject exists and the duty of the King.

Now, what would have been the duty of the King? The duty of the King would have been greater than the obligation of the Defendant, because the duty of the King would certainly have been, first of all, not to do anything to this bank to enable the sea to break through; but I have no doubt that the duty of the King,

(1) 10 Rep. 141, a.

although imperfect in obligation, would have been, if it were patent that the bank were becoming by natural causes insufficient, to restore the bank, or, if necessary, to provide a new bank. That may be, and I suppose would be, by means of a commission of sewers. The King's duty, therefore, would be to make a bank if it were not there—to improve the bank if it required improving, and to restore the bank if it were injured by natural causes; but certainly it would be a breach—if one may respectfully say so—of duty on the part of the Crown to break through the bank, that is, to do the very thing which the Defendant here has done. There is a duty on the part of the Crown which gives rise to a correlative right on the part of the subject; the subject has a right to have that bank in that place, or a corresponding bank.

Now, I confess I see no answer to the reasoning of the learned Judge. He says (and this is the only place where I can see strictly that his use of the word "prerogative" may be closely criticised), "If this prerogative and right exist in the Crown." I think it would have more clearly expressed his idea if the word had been if this royal duty on the part of the Crown, and this right on the part of the subject exist, "it seems to me impossible to suppose that the subject can have a right to do that which the Defendant claims to do:" that is, that a subject should have a right to do that which would be a wrongful act on the part of the Crown, and to do an act which it would be the duty of the Crown immediately to correct. It seems to me impossible that that can be the law, and that is the ground on which the learned Judge has acted, and that is the principle, and as at present advised, I think the only principle upon which this judgment can be affirmed. But I am clearly of opinion that that ground is a good one, and that the judgment ought to be affirmed.

COTTON, L.J.:—

I am of the same opinion.

The case which is before us is this: The Plaintiff, a landowner, seeks relief against the Defendant on the ground that the Defendant is so dealing with his own land as to damage the land of the Plaintiff. Now the Plaintiff happens to be an officer of the Crown in whom the land in question is vested for certain public

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purposes, but that, in my opinion, is immaterial. The question must be dealt with just as if there were a subject as Plaintiff complaining of a subject as Defendant.

What is the Act complained of? I think it has been somewhat misunderstood on the part of the Appellant. As I understand it, it is this: the Plaintiff's land is situated a short distance from the sea, and the only land intervening between the Plaintiff's land and the sea is the land of the Defendant, and the complaint is that the Defendant is so dealing with that land, by removing the shingle which constitutes the whole of the surface of that land, that the sea will at a time which cannot positively be stated, but within a reasonable time, undermine and destroy the land and the building of the Plaintiff upon his land. That, in fact, is the evidence of Sir *John Coode*, and as far as I have heard, there has been no contradictory evidence, and it is probable, from what we know as to the removal of shingle and the effect of the sea, that that will be the result.

It was put by the Defendant as if the complaint was this—that from his operations in removing the shingle the crest of the bank of shingle had been driven back, and had been driven back partly on to a corner of the land of the Plaintiff. In my opinion that is not the real ground of complaint.

Then the question which we have to consider is this, whether or no that prospective or apprehended injury to the land of the Plaintiff is one which, if done, would be actionable, and one which the Court ought to restrain by injunction. I am of opinion that it is. What the Defendant says is this, "I am only dealing in the natural way with my land, and I have a right to deal with it in the natural way, that is to say, in the only way in which profit can be made out of it."

I will not enter minutely into the question—which is a difficult one—as to what is the natural use of land. The natural use of minerals is held to be the digging them out and making them merchantable, and possibly and probably the natural use of the shingle is to take it for the purposes for which it has been taken and selling it.

But does that justify the Defendant in doing by that means an injury to his neighbour? The right of one to use his land for

natural purposes, though some loss does accrue to his neighbour, is an exception to the general rule; but, in my opinion, that cannot apply where the land with which the Defendant is so dealing is, before it comes into his hands, subject to an obligation, which is being interfered with by the act which he does. In that case, whether it is the natural use of the land or not in the sense in which that word has been used, if he is breaking an obligation or duty attaching to the land, in my opinion his neighbour, if he is injured, has a right of action; if his neighbour apprehends an injury, and can satisfy the Court that that injury will come if the acts are continued, he has a right to an injunction.

I do not dissent from the way in which the Lords Justices have put their judgments, and from the way in which Mr. Justice *Fry* has put it; but what I rely on is the second ground which has been put by Lord Justice *James*. Theoretically, for the purpose of considering how the matter legally stands, all land must be considered as having been derived from the Crown, and the question arises what were the obligations of the Crown as regards this land now vested in the Defendant?

This is material, because where land is vested in the Crown subject to public uses, the grantee of the Crown must take it subject to all the obligations to which the land was subject when in the hands of the Crown. The Crown holds the bed of a navigable river or the shore of the sea between high and low water-mark subject to the right of navigation, and the grantee of the Crown can never do anything to interfere with the navigation, and if a grant were made for the purpose of enabling the grantee to do that which would interfere with the navigation, that would be a void grant, because it would be a grant which the Crown could not make, having regard to the fact that it held the land for the benefit of the public, that is, subject to the public right of navigation.

What, then, was the right and duty of the Crown as regards this land when it was in the hands of the Crown? The duty and obligation of the Crown was to protect the land from the incursions of the sea, and if there is land vested in the Crown which is a natural barrier against the sea, in my opinion the public have a right to say that the Crown shall not deal with that in such a

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way as to deprive the realm of that natural barrier against the sea, and a grantee of the Crown can stand in no better position than the Crown itself would do.

But against that it is said how can you enforce that right as against the Crown? The subject cannot, for this reason, and for this reason only, that the Crown is not amenable to the jurisdiction of the Court, and any default of duty on the part of the Crown (unless where a petition of right gives a remedy) cannot be made the ground of an action. The subject must seek redress by petition to the Crown, and in that way only. But when once you get the land into the hands of a subject, who is liable to the jurisdiction of the Court, any other subject who suffers a special injury from the user of the land can by action insist on the land not being used in contravention of the public right. In my opinion the land of the Defendant, when vested in the Crown, was held by the Crown for the public purpose of protecting the land from the sea; the land could not be granted free and discharged from that duty, and the Defendant, or those through whom he claims, as they theoretically take from the Crown, must hold the land subject to that duty, and cannot be allowed to use the land in such a way as to destroy the natural barrier against the sea.

I am of opinion, on these grounds, that the injunction is right, and the appeal must be dismissed.

Solicitor for Appellant: *W. F. Stokes.*
Solicitor for Respondents: *W. Tindal Perkins.*

Ex parte MASON. *In re* WHITE.

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C. J. B.
Feb. 26.
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1880
March 11, 23.

Adjudication of Bankruptcy— Two Petitions against same Debtor — Second Petition heard first—Collusion between Debtor and Second Petitioner— Power of Court over Conduct of Proceedings—Appeal—Locus Standi — "Person aggrieved"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71— *Bankruptcy Rules,* 1870, *rr.* 34, 42, 48, 60.

When two bankruptcy petitions are presented against the same debtor, and he consents under rule 42 to an immediate adjudication being made against him on the second petition, the first petition not having been served, the Court has power to hear the second petition first and make an immediate adjudication on it without requiring any notice to be given to the first petitioner.

But, if in such a case the adjudication on the second petition has been obtained by collusion between the debtor and the second petitioner, the Court has power to give the conduct of the proceedings under the adjudication, up to the appointment of a trustee, to the first petitioner.

The first petitioner is not a "person aggrieved" by the adjudication, within the meaning of sect. 71, and has no *locus standi* to appeal from it.

On the 18th of December, 1879, a bankruptcy petition was presented to the *Sheffield* County Court by Messrs. *J. & W. Nicholson & Co.*, distillers, of *London*, against *Edward White*, manager of the *Royal Hotel, Worksop.* The petition was filed in the County Court at 10.15 A.M. It stated that *White* had committed an act of bankruptcy by filing a liquidation petition in the County Court on the 24th of November, 1879, by which he alleged that he was unable to pay his debts. An order was made, under rule 34 of the Bankruptcy Rules, 1870, that the petition should be heard at the County Court on the 8th of January, 1880, at noon. This petition was personally served on *White* in the evening of the 18th of December. On the same day a second bankruptcy petition against *White* was presented to the County Court by Messrs. *B. B. Mason & Son*, wine merchants at *Hull*, alleging the same act of bankruptcy. This petition was filed in the County Court at 3.50 P.M. on the same day, and an order was made that it should be heard at the same time and place as the first petition. *Mason & Son* were friendly creditors, and their petition was filed by Mr. *Porrett*, who had acted as *White*'s solicitor in filing the

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liquidation petition. *White* was immediately served with *Mason & Son's* petition, and he signed a written consent to an adjudication being made forthwith, and made an affidavit stating that a petition had been presented against him by *Nicholson & Co.*, but that it had not yet been served or heard, and that delay would be avoided if *Mason & Son's* petition was heard before the other. *Mason & Son's* petition was accordingly heard by the Judge, and an adjudication was made on it between 4 P.M. and 5 P.M. on the 18th of December.

Nicholson & Co. appealed to the Chief Judge, alleging that they were aggrieved by the order of adjudication.

The appeal was heard on the 26th of February, 1880.

There was evidence that soon after *Nicholson & Co.'s* petition had been filed Mr. *W. C. Gregory*, a clerk of Mr. *Porrett*, searched the files of the Court, and then sent the following telegram in the name of *Porrett* to *White* at *Worksop*:—

"Meet me by 11 train at *Station Hotel*. Keep inside hotel till I come. Danger."

Gregory went to *Worksop* by train, and arrived there at 11.15 A.M. *White* met him, and they returned together by train to *Sheffield*, and went to *Porrett's* office. The result was that *Mason & Son's* petition was filed. After the adjudication had been made upon it *White* returned to *Worksop*, and was then served with a copy of *Nicholson & Co.'s* petition. The first meeting of the creditors under the adjudication was held on the 7th of January, 1880, when Mr. *A. Field* was appointed trustee. An application was made to the Registrar on behalf of *Nicholson & Co.* for an adjournment of the meeting till after their appeal to the Chief Judge should have been heard, but the application was refused.

W. Wightman Wood, for the Appellants.

E. Cooper Willis, for *Mason & Son*.

BACON, C.J.:—

The first objection is, that the Appellants are not "persons aggrieved." In my opinion that objection cannot be sustained. A man who is prevented from pursuing a legal remedy which he

has commenced by the interposition of another person—an interposition which in the judgment of the Court ought not to be permitted—is unquestionably an aggrieved person.

Then for the rest—the rule is as plain as it can possibly be. The policy of the law is equally plain. If a man presents a petition asking for an adjudication in bankruptcy, the rule directs that thereupon a day shall be named for the hearing of the petition. In this instance the day named was the 8th of January. The reason for that is, that there may be due time for serving the debtor, and time furnished to the debtor after being served, to prepare himself to oppose the petition if he can. The 8th of January was the day which the Court, having seisin of the subject, fixed for the hearing of the petition. Applying the 48th rule to that, it is clear that the only day upon which the petition is to be heard—without reference whatever to the other clauses of the 48th rule—is the 8th of January. That is the day on which the Petitioner is to present himself to the Court, and ask for an adjudication. In the meantime somebody else comes in. Then, the 48th rule, having in plain and distinct terms said that "the petition which was first presented shall be first heard," goes on to provide that "where such first petition shall not have been served, or where the debtor shews cause against the petition, or where delay will be avoided, any other petition which has been served may be heard." It is quite clear that it is a perversion of the terms of the Order to say, that any petition which may be presented in the interval between the presentation of the first petition and the decision of the Court can be entertained by the Court, unless one of these things shall have happened. One is, "where such first petition shall not have been served." Here the service is not disputed. Mr. *Willis* has suggested that the service was by an agent and not by an attorney. But the rule which requires that the service shall be made by an officer of the Court is only to prevent the service being improperly and irregularly made, and so becoming the subject of dispute. There is no such case before me. The agent of the petitioning creditor is just as much justified in serving the petition as anybody else. It is not disputed that it was served. Then upon the very day on which the petition was presented, but at a later hour, there is the inter-

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ference of another creditor. In my opinion it is an abuse of the practice of the Court, on the part either of a petitioner, or his solicitor, that, after he has obtained an order that on a particular day the Court will hear and determine his petition, and after he has in due course proceeded to serve his petition, the time provided by the statute not having run out, some person should come with the bankrupt, so to speak, in his hand—I do not say in collusion with the bankrupt, but with his consent—and so take the wind out of the sails of the first petitioner, and make the provision of the 48th rule, that the petition which is first presented shall be first heard, a nullity. If the petition cannot be served, that is one case mentioned in the rule, that might have happened; or if the debtor had shewn cause against the petition, that might have happened. But here it is not suggested that he had any cause to shew, for he consents to an adjudication upon another petition which alleges the same act of bankruptcy. The act of bankruptcy is quite clear upon both the petitions, because by the filing of a petition for liquidation the debtor admits his insolvency. What delay would have been avoided? The debtor swore that delay would be avoided if the petition presented by *Mason & Son* was heard before the other. Nothing can be worse; and one regrets to find affidavits so readily prepared and sworn to, without a single fact to justify the statement that delay would be avoided. There is no evidence that the proceedings were delayed. The proceedings were perfectly regular. I think the first petitioner is entitled by law to be first heard, and as none of the causes mentioned in the rule have intervened to prevent the hearing of the first petition, I am of opinion that that petition must be proceeded with, and the proceedings under the second petition must be suspended. That will avoid the possibility of any failure of justice, through no adjudication being made upon the first petition.

Under the circumstances I must give the Appellants their costs against the creditors who presented the second petition; for, to speak plainly, I look upon it as a mere juggle and contrivance. There is a telegram from a solicitor who was then acting for the bankrupt asking him to come in all haste, and to keep himself concealed until that solicitor should have the opportunity of con-

ferring with him and directing him what to do. In justification of this proceeding I have heard nothing whatever. I look upon that as a contrivance suggested by the ingenuity of the Respondents' solicitor for using the 48th rule to baffle the first Petitioner.

The appeal will be allowed, with costs.

The order made by the Chief Judge declared that the adjudication was not to prejudice the right of the Appellants to prosecute the first petition, and ordered that all proceedings under the adjudication on the second petition should be stayed until after the first petition should have been heard and disposed of. And it ordered *Mason & Son* to pay the costs of the appeal.

From this order *Mason & Son* appealed. The appeal was heard on the 11th of March, 1880. C. A.

De Gex, Q.C., and *E. Cooper Willis*, for the Appellants :—

There was no jurisdiction to stay the proceedings. *Nicholson & Co.* had no right to appeal from the adjudication; they were not "persons aggrieved" by it within the meaning of sect. 71. They themselves asked for an adjudication by their own petition. The petitioners on the second petition and all the other creditors are injured by the stay of proceedings. The adjudication was properly made on the second petition: Bankruptcy Rules, 1870, rule 48 (1); and the Court could not afterwards make another adjudication.

(1) Rule 34: "The Registrar shall appoint the time and place at which the petition will be heard, and notice thereof shall be written on the petition and sealed copies, and where the petition has not been served the Registrar may from time to time alter the first day so appointed, and appoint another day and hour."

Rule 42: "Where a petition is presented and the act of bankruptcy stated to have been committed is that the debtor has filed in the Court to which the petition is presented a declaration admitting his inability to pay his debts, the Court may, if the debtor consents in writing thereto, hear and adjudicate upon the petition forthwith."

Rule 48: "Where two or more petitions are presented to the same Court against the same debtor, or against debtors being members of the same partnership, the petition which was first presented shall be first heard; and where such first petition shall not have been served, or where the debtor shews cause against the petition, or where delay will be avoided, any other petition which has been served may be heard, and, if the Court makes adjudication thereon, the Court shall, after the expiration of the time allowed for ap-

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Winslow, Q.C., and *W. Wightman Wood*, for *Nicholson & Co.*:—

Under the old practice the creditor who first petitioned was entitled to four days within which no other creditor could present a petition, and if he struck a docket he was entitled to fourteen days. He was taking a proceeding at his own risk for the benefit of all the creditors, and he had a monopoly of the proceedings. This monopoly is preserved to a certain extent by the Rules of 1870; the creditor who first petitions is still entitled to have his petition heard before any other: Rule 48. The exceptions mentioned in that rule do not apply to the present case. The two petitions were appointed to be heard at the same time and place. According to the settled practice of the *London* Court of Bankruptcy, if the debtor consented to an adjudication on a second petition, the act of bankruptcy being the same, notice would be given to the first petitioner, and the two petitions would be heard together, and if there were more than two petitions the same course would be followed. The only reason why the first petition was not served first was, that the second petition was presented by the debtor's own solicitor, who gave him a hint to keep out of the way. Rule 60 provides that a bankruptcy petition must be served seven days before it is heard. There is no provision in the Rules enabling the Court to give the conduct of the proceedings under an adjudication up to the appointment of a trustee to any one but the creditor who has obtained the adjudication. It is a matter of great importance who has the conduct of the proceedings; the person who has the conduct is in a better position to obtain proxies, and to carry the election of a trustee; and if that which has been done in the present case is valid, a debtor will always, by means of the petition of a friendly creditor, be able to prevent an adjudication being obtained against him by a hostile creditor, and thus to prevent a proper investigation into his conduct. Rules 34 and 48 ought to be read together; "served" in rule 48 must mean served before the day appointed for hearing the petition. The creditor on whose petition

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peal against the adjudication, dismiss all the other petitions upon such terms as to costs as it shall deem just."

Rule 60: "A bankruptcy petition shall be personally served seven days before the day of its hearing by delivering to the debtor a sealed copy of the filed petition."

an adjudication is made is entitled to his costs out of the estate: Rule 31; *Ex parte Page* (1). This Court can, if it think fit, annul the adjudication. It has power to make the order which the Chief Judge ought to have made: Order LVIII., r. 5.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge cannot be sustained. Rule 48 says that where two or more petitions are presented against the same debtor, the petition which was first presented shall be first heard, but the latter part of the rule shews that this means it shall be first heard if there be no other reason why one petition rather than another should be heard first, *i.e.*, *cæteris paribus*, the petition first presented shall be heard first. But the rule goes on to say that, where the first petition shall not have been served, or where the debtor shews cause against the petition, or where delay will be avoided, any other petition which has been served may be heard. In the present case there were two petitions; the first had not been served, but the second had; delay would be avoided by the making of an adjudication, and therefore the Judge had jurisdiction under the rule to hear the second petition. He did hear it, and he made an adjudication upon it, and we have heard nothing to shew that that adjudication is invalid. It became effectual for the benefit of all the creditors. It may be that the bankrupt facilitated the making of the adjudication by doing that which he had a right to do under the provisions of rule 42, by consenting in writing to an immediate adjudication. In so doing he was right in point of form, and an adjudication was made which we cannot set aside. It may be that there has been collusion in his preferring a petition presented by a friendly creditor, and through his own solicitor, to another petition presented by a hostile creditor. This sort of collusion used frequently to occur in the Court of Chancery when a bill was filed for the administration of the estate of a dead man by one creditor against the executors, and another bill was afterwards filed by another friendly creditor against the same defendants. The executors appeared and submitted to an administration decree in the friendly suit, and they thereby to that extent defeated the

(1) 25 L. T. (N.S.) 716.

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suit which had been commenced first by the hostile creditor. I can see no distinction between the case of a creditor seeking an adjudication of bankruptcy, and a creditor seeking the administration of the assets of his deceased debtor. When the Court of Chancery saw that the second suit had been instituted really for the purpose of defeating the first, the practice was, after the decree had been made in the second suit, to stay the proceedings in the first, and to allow the plaintiff in that suit to apply for an order giving him the conduct of the proceedings under the decree. Sometimes, indeed, the conduct of the proceedings was at once given to the plaintiff in the first suit, without his making a special application for it. I am of opinion that the Court of Bankruptcy in the same way has full power, upon the application of the first petitioning creditor, to give him the conduct of the proceedings under the adjudication up to the appointment of a trustee, and the right of using the name of any other person, so far as may be necessary for that purpose. I think that if the facts are as they have been stated to us by the Respondents' counsel, the County Court Judge ought to have given to them, under the adjudication, which was obtained by arrangement between the debtor and the second petitioners, every advantage which they would have had if the adjudication had been made on their own petition. That is the proceeding which ought to have been taken. The Respondents have been wrong throughout. They made no application to the County Court Judge to give them the conduct of the proceedings, but they appealed against the adjudication, which had been rightly made, the debtor having committed an act of bankruptcy. They were in no worse position than if the adjudication had been made on their own petition, for, under rule 33, any creditor is entitled to apply to the Court for the appointment of a receiver or manager to protect the debtor's property and business. The Respondents have taken an entirely wrong course, and they have failed, and they must bear the usual consequence of paying the costs of their unsuccessful proceedings.

BRETT, L.J.:—

The construction of rule 48 is to my mind clear enough. The time referred to in it is the time when the second petition is called

on to be heard, and the rule gives the Court a discretion to say whether the second petition shall be heard first. The Court may hear the second petition first, and may make an adjudication upon it, though it is not obliged to do so. But, if it does make an adjudication on the second petition, then the next provision is absolute; the Court shall, after the expiration of the time allowed for an appeal against the adjudication, dismiss the other petition. The object of this provision is to give the debtor an opportunity of appealing against the adjudication. It has been suggested that the time referred to in rule 48 is the same as that which is mentioned in rule 34, but it seems to me that rule 34 applies to the time when the petition is presented. Rule 60 makes a provision entirely in favour of the bankrupt. This being the interpretation of the rules, if the facts which have been stated to us had been known to the County Court Judge when he was asked to hear the second petition and to make an adjudication upon it, I think it is very likely he might have declined to do so, because he had a judicial discretion in the matter. But these facts were not made known to him, and he adjudicated the debtor a bankrupt. An appeal was presented to the Chief Judge, and he declined to set aside the adjudication. I am not prepared to say that we ought to do so on the grounds presented to us. I have come to the conclusion that the wrong remedy was asked for by the Respondents. I think they ought to have applied, not to annul the adjudication, but that the carriage of the proceedings under the adjudication should be given to them. But that cannot be done now, for a trustee has been appointed.

If the facts have been truly stated to us, I object altogether to what was done. The debtor's solicitor had no business to interfere in the matter at all. The sending of the telegram with the warning of danger is a thing to which I have a great objection. As, however, the wrong remedy was taken by the Respondents, I cannot object to the ordinary rule being followed, that they must pay the costs of this appeal and of the appeal to the Chief Judge.

COTTON, L.J.:—

I am of the same opinion. I think we ought to consider the case in the same way as if the Respondents had given a cross

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notice of appeal under rule 6 of Order LVIII. If necessary, of course we could order the hearing of the appeal to stand over to enable the Respondents to give such a notice. In considering what order ought to have been made upon the application to the Chief Judge, I have felt very great doubt whether the Respondents had any right of appeal from the adjudication, whether they were "persons aggrieved" by it within the meaning of sect. 71 of the Act. How can they be aggrieved by the order of adjudication, the very thing for which they themselves were asking? Their complaint really is, not that an adjudication has been made, but that the conduct of the proceedings under it will get into the hands of the second Petitioners and their solicitors. They are not aggrieved by the order of adjudication itself, but by some of the consequences which result from it. The proper course for them to adopt would have been, not to seek to discharge the order of adjudication, but to apply to the Judge who had made that order, not complaining of it, but asking that they might have the conduct of the proceedings under it, using (if necessary) the names of the creditors on whose petition the order was made, they indemnifying them against costs. But, supposing that the Respondents had a *locus standi* to appeal from the order of adjudication, I can see no reason for discharging it, and I think that the course taken to obtain it was justified by the rules. And, indeed, the Chief Judge seems to have taken the same view, for he only stayed the proceedings under the adjudication, and did not direct the application to annul it to stand over till after the hearing of the first petition. The question is whether his order was a right one. With every respect to him I cannot see how it could be a right order. The result of it would be that the order of adjudication would remain, and the time for appealing from it would have expired, and then it would have been the duty of the Court, under rule 48, to dismiss the other petition. So that, even if the order of the Chief Judge remained unaltered, I cannot see what benefit to the Respondents would result from it. I have already pointed out what, in my opinion, would have been the proper course for them to pursue. But a trustee has been already appointed under the adjudication, and no application can now be made by the Respondents for the conduct of the proceedings. I

do not think it right to express any opinion whether in the present case the conduct of the proceedings ought to have been given to the Respondents. But I have no hesitation in saying that it would be proper to give the conduct of the proceedings under an adjudication to the creditor who first petitioned when an adjudication on a subsequent petition has been snatched by means of collusion or arrangement with the debtor. I do not approve of the proceedings in the present case, if they have been correctly stated to us, but, as Mr. *De Gex* has not been fully heard upon the facts, I will only say that, in my opinion, the Court has power when an adjudication has been obtained by collusion to give the conduct of the proceedings under it to another creditor. As, however, the Respondents have adopted a wrong course they must take the usual consequence of so doing, and must pay the costs both in this Court and before the Chief Judge.

JAMES, L.J.:—

I wish to add that I entirely agree with Lord Justice *Cotton* that the Respondents were not "persons aggrieved" by the adjudication within the meaning of sect. 71. As the order of the Chief Judge is made in the matter of the first petition, we can deal with the costs of that petition. It must be dismissed, and the Petitioners will have their costs of it out of the bankrupt's estate.

March 23. *Winslow*, Q.C., for the Respondents, asked for leave to appeal to the House of Lords.

De Gex, Q.C., for the Appellants, opposed.

THE COURT (*James*, *Brett*, and *Cotton*, L.JJ.) refused the application.

Solicitors for Appellants: *Layton & Jaques*, agents for *D. H. Porrett, Sheffield.*

Solicitors for Respondents: *Nash & Field.*

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Proof in Bankruptcy—Secured Creditor—Valuation or Realization of Security—Declaration of Dividend—Reservation of Dividend by Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 40, 41, 42, 43, 72—*Bankruptcy Rules*, 1870, *rr.* 136, 272, 311, 312, 313, 314.

Until a secured creditor of a bankrupt or liquidating debtor has valued or realized his security he has no debt provable in respect of which the trustee is bound to make any reserve on declaring a dividend.

Decision of *Bacon*, C.J., reversed.

If, by reason of any special circumstances, a secured creditor is prevented from realizing his security before a dividend is declared by the trustee, the Court has power under sect. 72 to give such directions as may be proper to prevent any injustice being done.

Per Cotton, L.J.: Rule 136 applies only to the case of a secured creditor who desires to value instead of realizing his security, and even then it only gives the trustee, if he is dissatisfied with the value stated by the creditor, a power indirectly to compel the realization of the security, by refusing to admit the creditor's proof till he has realized the security.

Sect. 31 does not enable the trustee to make an estimate of the ultimate balance which may be due to a secured creditor who has not valued or realized his security.

ON the 22nd of June, 1878, *John Lee & Sons*, who were blanket manufacturers at *Earlsheaton*, filed a liquidation petition in the *Dewsbury* County Court. At the first meeting of the creditors, Messrs. *J. D. Good* and *J. W. Close* were appointed trustees.

The *London and Yorkshire Bank* were creditors of the debtors, and they held as security for their debt 244 bales of blankets, and some other property belonging to the debtors. The debtors, in the statement of their affairs which they produced at the meeting of the creditors, valued the securities at a sum exceeding by £1000 the amount of the debt due to the bank. On the 5th of July, 1878, the trustees wrote to the general manager of the bank, asking him to furnish full particulars of the claim of the bank, and the value and nature of the securities which they held. On the 6th of July the manager replied to the effect that the amount due to the bank was £8015 7*s.* 7*d.*, less £2664 10*s.* 3*d.* "by balance at credit of suspense account for realization of securities," leaving a balance of £5350 17*s.* 4*d.* due to the bank. On the 1st

of August the trustees wrote again to the manager, asking him to furnish particulars of the amount of £2664 10*s.* 3*d.*, and of all the remittances the bank had received since the 6th of July forming a portion of realized securities. On the 3rd of August the manager replied, sending a copy of the debtors' account current with the bank, and saying, "I propose to send you a formal proof in the course of next week, and shall be glad to know thereafter at your earliest convenience what course you propose to adopt in regard to it." On the 9th of August one of the trustees wrote to the manager: "I am having your account examined, and, as soon as the same is done, the matter shall be brought before the committee. I do not understand your sending in a formal proof, as I presume, if we pay you the amount of your account, you will have no proof against the estate." On the 10th of August the manager replied: "Of course if you can make arrangements for paying off the amount of our claim, there will be no necessity for our sending in a proof." On the 21st of August the manager wrote to the trustees as follows: "I beg to inclose proof of claim against this estate as it stood on the 8th inst. Since that date the bill for £500 due on the 19th inst. has been paid, and of course falls to be deducted from the amount of proof. There are accruing payments for insurance, storage, &c., which will require to be added, but I send it in its present state in order that you may have an affidavit of the debt owing as a basis for settlement. As we intend in the course of a month or so to expose for sale the whole of the blankets held by us, it will be desirable, if you propose taking the sale into your own hands, to do so as soon as possible." The proof inclosed with this letter was an affidavit by one of the officers of the bank, which stated that, at the date of the filing of the liquidation petition, the debtors were indebted to the bank in the sum of £8754 17*s.* 5*d.*, for money lent and advanced, with interest and discount thereupon, but which sum had since been reduced by the realization of securities in the hands of the bank to the sum of £6523 4*s.* 1*d.*, for which sum the bank held no security, except 244 bales of blankets, 55 pieces of army cloth, an assignment from the debtors to the bank of moneys owing to them from the *India* Office, and certain bills of exchange mentioned in a schedule to the affidavit. The deponent added, "but the value

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of which securities I am unable and do not now propose to estimate." On the 22nd of August Messrs. *Walker & Sons*, the solicitors to the trustees, sent to the bank a notice requiring them, "within fourteen days from the date hereof, to estimate and assess the value of the security held by you in respect of the debt due to you by the above-mentioned debtors, as prescribed by rule 136 of the *Bankruptcy Act*, 1869."

On the 3rd of September the manager wrote to the trustees: "I have received a notice from Messrs. *Walker & Son* requiring us to value the securities held by us on account of this estate, and, as we do not accede to their request, I should be obliged by your advising us if you intend to carry out your proposal to take the property into your own hands, and pay the amount owing to the bank." On the same day the manager wrote to *Walker & Son* acknowledging the receipt of their notice to value their securities, and adding: "In reply I have to inform you that, as set forth in our proof, we do not intend to value them, but to make default with regard to your notice, and to proceed at once to realize the property, unless arrangements are immediately made for taking it out of our hands and paying off the debt." On the 7th of September the trustees served on the bank a formal notice of the rejection of their proof, which was as follows:—

"Take notice that we reject your claim against the estate on the following grounds among others:—

"1. That you, being creditors holding security, were required by us by a notice dated the 22nd of August, 1878, within fourteen days to estimate and assess the value of the security held by you in respect of your debt, and that you have not assessed and valued your security pursuant to the said notice and to rule 136, and have refused to do so, and that you are not entitled to prove on the said estate.

"2. That your proof is informal, irregular, ambiguous, and does not set out the value of your securities, and is bad in law.

"3. That we intend to exclude you from dividend, and that such exclusion will be final unless you apply to the Court to prove your debt, and proceed with such application with due diligence."

On the 9th of September, 1878, Messrs. *Walker & Son* wrote

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to the general manager of the bank: "We duly received your letter of the 3rd inst., and observe what you state with reference to realizing the property. The trustees have no intention of taking the goods out of your hands, but will act strictly upon the notice we served on you on the 22nd day of August. Your proof herein has been rejected by the trustees, notice of which we forwarded you on Saturday last in a registered letter."

On the 16th of September, 1878, the manager wrote to Messrs. *Walker & Son:* "On my return from the country, where I have been for the last five weeks, I find your letter of the 9th inst., together with the notice by the trustees, rejecting the bank's proof on this estate, dated the 7th inst. I am not sure that I am yet perfectly cognisant of all the facts of the case, but it appears to me that there is no occasion for our taking any steps by application to the Court in the matter, which would only lead to unnecessary expenses. I have no objection to consent to the rejection of the proof, or to withdraw it altogether and substitute a fresh one when our securities are realized, as I hope they shortly will be, and this is in fact the course which I intend to follow in the matter, as I am unable at the present moment to assess the value of the securities held by the bank, until I have an opportunity of determining the same by actual sale. I shall be obliged meanwhile by your informing me whether the trustees have given any notice of their intention to declare a dividend, or whether it is their intention shortly to do so, as, in the event of the whole estate being about to be shortly distributed, I should, of course, rather adopt a forced valuation than allow the bank to be excluded from the chance of participating in a dividend, although at the same time I have no reason to believe that we shall ultimately have occasion to lodge a claim at all.

"You will, of course, understand that by withdrawing our proof, or consenting, as we do, to its rejection in its present form, we in no way preclude ourselves from lodging a fresh one, should we at any future time find ourselves in a position requiring us to do so."

On the 20th of September *Walker & Son* wrote to the manager: "We beg to say on behalf of the trustees that they do not concur in your observations, and that they will reject any further proof the bank may tender." On the 21st of September the manager

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wrote to *Walker & Son*, asking whether the trustees had given notice of the declaration of dividend, or whether they were about to do so, and added: "Meanwhile you will please take notice that we have a claim upon the estate, a proof for which we shall submit so soon as we are in a position to do so." On the 26th of September *Walker & Son* replied: "We are not aware whether or not the trustees have given notice of the declaration of dividend, or whether they are about to do so. The trustees will no doubt give the usual notice when they declare a dividend." On the 28th of September the manager wrote to the trustees, asking for information about the declaration of a dividend, and repeating the notice that the bank would have a claim upon the estate after realizing their securities. On the 30th of September one of the trustees replied: "All I can say is, I have advertised for claims long ago, and have declared no dividend as yet." On the 3rd of January, 1879, the trustees, without any further communication with the bank, declared a dividend of 3*s.* 6*d.* in the pound, payable on the 15th of January. They had previously inserted in the *Gazette* a notice, in the form No. 125 of the Bankruptcy Forms, 1870, as prescribed by rule 312, requiring the creditors who had not already proved their debts to do so.

On the 16th of January the manager wrote to the trustees: "As we have now realized the whole of our securities, with the exception of fifty blankets still on hand, I am in a position to hand you our proof upon the estate, which I inclose . . . . I shall be obliged if you will kindly inform me when a dividend is likely to be declared and the amount of it." The proof sent with this letter was an affidavit by the manager, in which he said that the debtors were indebted to the bank in the sum of £2635 10*s.* 5*d.*, and that the bank had no security for the same, except fifty-two pairs of blankets, which he valued at £50, and three bills of exchange, the particulars of which were given in a schedule. On the 31st of January one of the trustees wrote to the manager: "I have been unable to have a meeting of the committee of inspection, but you are aware that you will not be prejudiced in any way by the delay, as the proof was received after the dividend had been declared, and you would not be entitled to receive dividend on any proof not sent in previous to the day of declaration

of dividend." Further correspondence took place, and ultimately on the 12th of July, 1879, the bank gave notice of their intention to apply to the County Court for an order directing that the trustees should forthwith pay to the bank in respect of their proof against the estate the amount of the dividend already paid out of the estate to the other creditors. The Judge of the County Court ordered the trustees to pay the bank a dividend of 3*s.* 6*d.* in the pound upon the amount of their proof for £2635 10*s.* 5*d.*, and to pay the bank's costs of the application. The trustees appealed to the Chief Judge. The appeal was heard on the 12th of January, 1880.

E. Cooper Willis, for the Appellants.

Winslow, Q.C., and *Finlay Knight*, for the bank, were not heard.

BACON, C.J.:—

I am of opinion that the learned Judge's order was quite right. The long correspondence which has been read shows the manner in which the parties dealt with the subject-matter. The bank, having a large debt due from the debtors, also held security, particulars of which had not been given and had never been asked for. The suspense account represents, if I understand it, the value of the securities which the bank held. Some delay took place, the bank did not make up their mind to proceed at once to realize the security, and this correspondence took place. I cannot say that I think the trustees' solicitors behaved with the fairness which might be expected from men of business. However, in the end the proof was rejected, only because the securities had not been realized and the account completed. It seems to me that from the very beginning the trustees had plain and distinct notice that the bank insisted on their right to prove for something, and they have never sought to prove for anything more than was due to them after their security had been realized.

Then the trustees shelter themselves under the excuse that they had given the notice which the rules required, and that at that time the proof had been rejected. The 312th rule is really the only one of any importance, or which has any reference to the case, and it is

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the rule on which the learned Judge has founded his decision. I say it is the only one of importance, although I have attended to the 136th rule which carries into effect the long-established practice in bankruptcy. So that, under it, if the trustees, who knew all along perfectly well that the bank held their security, and insisted upon their right to realize it, no particular value being placed upon it, were dissatisfied, they had it in their power to insist upon the proof being brought before the Court to ascertain the amount remaining due after the security had been realized. Then the 312th rule says, "Seven days at least before declaring any dividend under a liquidation by arrangement, a notice shall be gazetted by the trustee in the form given in the schedule, requiring the creditors to send in their names and addresses, and the particulars of their debts or claims, and on declaring a dividend a sufficient reserve shall be made by the trustee for such dividend, upon all debts and claims notified to him in pursuance of such notice. The trustee shall also be deemed to have notice of the debts of all creditors whose names are inserted in the debtors' statement of affairs, and except where any such debt has been adjudicated upon" (not decided by the trustee—the trustee is no judge) "prior to the declaration of the dividend, a similar reserve shall be made in respect thereof." And rule 313 provides, "Wherever the trustee shall reject the claim or proof of any creditor, he shall give notice to such creditor by post in the form given in the schedule," and I find the form No. 126, which is given in the schedule, consistent with the whole of the provisions of the statute.

The meaning of the rules is, that the trustee shall not be embarrassed or troubled; but also that the creditors who have just claims shall have their rights decided, if there is a question between the trustee and the creditors holding security. The trustee has it in his power. Why? In order that he may know what debts, if any, shall be admitted to proof, and may arrange a dividend in respect of those debts. It enables him, moreover, to give that notice to which I have just referred, that is to say, express notice to the creditor claiming, that it is the intention of the trustee to exclude him from any dividend in respect of the claim which the trustee has rejected. In this case the trustee has rejected the claim of the bank simply because the form of it

did not please him. But the only proper ground of rejection is that no debt is due to the bank. No rejection ought to take place, except where a man makes an unfounded claim against the estate. Where the claim is good, and the trustee nevertheless rejects it, the creditor has a right, under the 313th rule, to apply to the Court to have his proof admitted. The 136th and 313th rules do in fact dispose of this case, and the circumstances fully justify the order which has been made.

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The appeal must be dismissed with costs.

From this decision the trustees appealed. The appeal was heard on the 18th of March, 1880.

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De Gex, Q.C., and *E. Cooper Willis*, for the Appellants:—

The order which has been made is a personal order for payment by us, as if we had acted improperly. But the bank had not valued or realized their security, and had not, therefore, proved their debt, before the declaration of a dividend. The debtors' statement shewed that the bank were over-secured. The whole administration of the estate cannot be stopped because there happen to be some secured creditors. Indeed the trustee is bound to declare a dividend within six months: *Bankruptcy Act*, 1869, s. 20. Under the old law a mortgagee could not enter a claim; he could not stop the payment of dividends while he was realizing his security. The material provisions of the present Act and Rules are contained in sects. 40, 41, 42, 43 of the Act, and rules 136, 272, 311, 312, 313, 314 (1).

(1) Sect. 40. "A creditor holding a specific security on the property of the bankrupt, or on any part thereof, may, on giving up his security, prove for his whole debt.

"He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the value of his security, in manner and at the time prescribed.

"A creditor holding such security as aforesaid and not complying with the foregoing conditions shall be excluded from all share in any dividend."

Sect. 41. "The trustee shall, from time to time, when the committee of inspection determines, declare a dividend amongst the creditors who have proved to his satisfaction debts provable in bankruptcy, and shall distribute the same accordingly; and in the event of his not declaring a dividend for the space of six months, he shall summon a meeting of the creditors, and explain to them his reasons for not declaring the same."

Sect. 42. "In the calculation and distribution of a dividend it shall be

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Under sect. 25 the trustee has power to decide upon proof of debts. The trustees, on the 7th of September, formally rejected

obligatory on the trustee to make provision for debts provable in bankruptcy appearing from the bankrupt's statements, or otherwise, to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs, or to establish them if disputed, and also for debts provable in bankruptcy, the subject of claims not yet determined."

Sect. 43. "Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any moneys for the time being in the hand of the trustee any dividend or dividends he may have failed to receive, before such moneys are made applicable to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein."

Sect. 72. "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act, shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

Rule 136. "A creditor who is desirous of giving credit for the value of his security in order to entitle him to a dividend in respect of the balance of his debt after deducting the assessed value, shall give notice thereof to the trustee, and the value of his security shall be determined in the same manner as the value of the security is to be determined, as prescribed with reference to the balance upon which a secured creditor may vote, and such creditor shall give credit for the value within fourteen days after he shall be called upon by the trustee so to do, unless he shall be out of *England*, and then within such reasonable time as the trustee may fix, having regard to the means of communication between *England* and the place where the creditor may be, and in default thereof shall be deemed to be fully secured. If the trustee or any other creditor shall be dissatisfied with the value put on the security, the trustee may require the security to be realized."

Rule 272. "A secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security. In cases of liquidation by arrangement any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realization of such security by the creditor, to redeem the same upon payment of such assessed value. The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same."

Rule 311. "All debts must be proved

the proof of the bank, which had been sent in after the trustees had given the proper statutory notice to the creditors to come in and prove their debts, and the bank did not appeal within the fourteen days. It was not necessary to give any further notice of the intention to declare a dividend. Is the trustee bound to reserve a dividend for a secured creditor who says, I shall realize my security when I please? or even if he says, I shall realize shortly? The bank had no right to any further information about the dividend.

[JAMES, L.J.:—In bankruptcy there is a provision by rules 131 and 132 that notice of the intention to declare a dividend shall be gazetted, and also given to the creditors mentioned in the bankrupt's statement who have not proved their debts, and that

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prior to the payment of dividend thereon by the trustee."

Rule 312. "Seven days at least before declaring any dividend under a liquidation by arrangement, a notice shall be gazetted by the trustee in the form given in the schedule, requiring the creditors to send to him their names and addresses, and the particulars of their debts or claims; and on declaring a dividend, a sufficient reserve shall be made by the trustee for such dividend upon all debts or claims notified to him in pursuance of such notice. The trustee shall be also deemed to have notice of the debts of all creditors whose names are inserted in the debtor's statement of affairs, and (except where any such debt has been adjudicated upon prior to the declaration of the dividend) a similar reserve shall be made in respect thereof."

Rule 313. "Wherever the trustee shall reject the claim or proof of any creditor, he shall give notice to such creditor by post in the form given in the schedule, and where the creditor is resident in *Europe* the trustee shall be entitled to exclude from dividend any such claimant or creditor whose debt he so rejects, unless such creditor shall, within fourteen days from the time at which the trustee's notice should have been delivered to him in the ordinary course of post, apply to the Court to admit his proof, and proceed with such application with due diligence. Where any such creditor is resident beyond the limits of *Europe*, such length of notice shall be given to him as the Court shall order."

Rule 314. "Except as before mentioned, the trustee shall declare dividends amongst such creditors only as have proved their debts up to the time of such declaration of dividend, and no creditor who has omitted to prove his debt, or to send to the trustee the particulars of his claim, or whose name does not appear in the debtor's statement, shall be entitled to disturb any such dividend, or to make any claim in respect thereof against the trustee; but, upon proof of his debt, any such creditor shall be entitled to receive the same prior to the payment of any further dividend to the other creditors."

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notice of a dividend having been declared shall be gazetted and given to each creditor who has proved. May not the letter of the trustees' solicitors on the 26th of September have been intended to mean, and have been understood by the bank to mean, that the trustees would give the notice usual in bankruptcy when they were about to declare a dividend?]

The codes of rules in bankruptcy and liquidation are entirely distinct: *Ex parte Hopkins* (1). The trustees could not possibly tell what was the value of the blankets held by the bank, and if they were bound to make any reserve for dividend, they must have reserved a dividend upon the whole of the bank's debt. The same thing would have to be done for all the secured creditors. In *Ex parte Bestwick* (2), Lord Justice *Mellish* said (3): "In a bankruptcy or a liquidation by arrangement a secured creditor is not entitled to receive any dividend until he has come in and proved his debt, and if he does this before realizing his security he must put a value on it." And further on he says that a secured creditor would have a right to "wait until he has realized his security, and then come in and prove the debt then due to him, and receive dividends on it, though of course he could not disturb any dividends already paid. But he would be entitled to share with the other creditors in the assets which might then remain for distribution."

Winslow, Q.C., and *Finlay Knight*, for the bank:—

A secured creditor may do one of three things: 1. He may give up his security and prove for the whole amount of his debt. 2. He may realize his security in the manner provided by the Act and Rules and then prove for the unpaid balance of the debt. 3. He may value his security and then prove for the balance of the debt. The liquidation rules are in substance the same as those which apply to bankruptcy. Formerly a creditor could disturb a dividend at any time before payment: *Ex parte Sturton* (4); and a creditor could enter a claim, and then, if a dividend was declared, a reserve was made for him. There is no provision

(1) Law Rep. 9 Ch. 506.
(2) 2 Ch. D. 485.
(3) 2 Ch. D. 488.
(4) De G. 341.

now for entering a claim. The real question is whether such notice of the claim of the bank was not given to the trustees as to bind them to reserve a dividend. The correspondence shews that such a notice was given. A mortgagee is not bound to value his security; he is only bound to realize it within a reasonable time. The trustee is bound to reserve a reasonable sum for dividend on the debt due to a secured creditor. The first proof sent in by the bank was intended only to inform the trustees, and to form a basis for a settlement of the claim. The trustees could have ascertained the value of the blankets as easily as the bank could; they could have taken the market value. If the creditor says, I can't value my security, the trustee, if he is dissatisfied, ought not to reject the proof and shut out the creditor from dividend altogether; but he ought to require the creditor to realize his security: Rule 136. The bank had in fact made what is called a claim in rule 313, though they had not sent in a proper proof before the dividend was declared. Sect. 31 empowers the trustee to make an estimate of the value of any debt or liability of the bankrupt which is subject to any contingency. Sect. 40 applies to the case. In a liquidation the debtor's statement of affairs gives the trustee information of all the debts, and it and the proofs of the creditors must be his guide in the declaration of dividends. If a mortgagee has no power of sale, his security can be realized under the provisions of rule 78. The old practice as to claims having been abolished, the trustee is bound to treat any debt of which he has notice as a claim.

De Gex, in reply:—

A secured creditor must realize or value his security before he can prove his debt, and till he has done that he is not entitled to receive a dividend or to have a dividend reserved for him. The object of the Act is the equal distribution of the bankrupt's property, not to favour secured creditors. Of course in a special case the Court could make a special order. Full power is given by sect. 72: *Ex parte Carew* (1). In a proper case the Court could stay the payment of a dividend, or could direct a reserve to be made, or could open the dividend after it had been paid.

(1) Law Rep. 10 Ch. 308.

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JAMES, L.J.:—

I am of opinion that the order of the County Court Judge, affirmed as it has been by the Chief Judge, cannot be sustained. It proceeds entirely upon the footing of a misfeasance on the part of the trustees, making them personally liable for the amount which, according to the contention of the Respondents, they ought to have retained to provide a dividend on that which might ultimately prove to be the amount of the Respondents' debt after they had realized their security. There is one very obvious arithmetical mistake in the order which has not been pointed out. It is quite clear that, if the trustees ought to have reserved something for this debt, the dividend would not have been 3*s.* 6*d.* in the pound. It would have been so much less. It would have been the proper dividend upon the whole amount of the other debts plus this debt. That would have been the proper measure of the dividend, and there would have been so much less for the other creditors. The liability, if any, of the trustees (because it is really not a personal liability) must, as it appears to me, depend on the provisions of the Act and the Rules. [His Lordship read sects. 40–43.]

Now, in the present case, beyond all question, the dividend was declared before anything that could be called or alleged to be a proof was sent in by the bank. It is admitted that what was called a proof, that which was sworn to as a proof, or claim, or whatever it was that was sent in in the first instance, was not in compliance with the provisions of the Act, and, as Mr. *Winslow* put it in his argument, was no proof at all, but was a mere estimate sent in for the purpose of completing the negotiation which was then pending between the bank and the trustees as to whether the trustees would not take the goods out of the hands of the bank, paying the whole of their demand. The other proof was sent in after the dividend had been declared. Therefore the bank had not become entitled to a dividend. What was it that the trustees were to retain, or why were they to retain it? It is said that by sect. 42 the trustees were bound to make provision for "debts provable in bankruptcy, the subject of claims not yet determined." It is said there was a debt provable in bankruptcy. There might be. But what was that debt? The

ultimate balance that might be due. The only debt provable in bankruptcy would be the balance, either after the security had been realized, or after deducting the amount of the valuation which the bank chose to put upon the security at their own risk in the manner prescribed by the Act and Rules. That was the only debt provable in bankruptcy, and therefore there was no debt provable in bankruptcy in respect of which the trustees could have retained anything. They had no means of knowing what was the debt which was provable in bankruptcy. The words "the subject of claims not yet determined" cannot, as it seems to me, enlarge the words "debts provable in bankruptcy." They must refer to such a case as this, where a man says, I have a debt of so many thousand pounds provable in bankruptcy; the trustee has not yet made up his mind whether he will admit it or not, and has reserved it for further evidence or for further investigation. In such a case as that there is a "debt provable in bankruptcy, the subject of a claim not yet determined." If the trustee had come to a decision adverse, wholly or partially, to the claim of a creditor, then the creditor should apply to the Court to determine what was the amount of the debt provable in bankruptcy. It all proceeds upon the notion that there is at the time a debt provable in bankruptcy which the trustee can either admit or make provision for. It appears to me that the possibility that a claim might arise at some future time by reason of the security proving insufficient does not come within—I do not say the spirit—but the meaning of the words "the subject of claims not yet determined;" and, if so, it appears to me that there was nothing in respect of which the trustees could have made any reservation. It does not appear to me that any case is made out of misconduct or misleading on the part of the trustees, so as to entitle the bank to a personal remedy against them irrespective of their rights under the Act.

The case is reduced to the question of the legal rights of a secured creditor who for some reason or other, good or bad, does not choose to realize or value his security before a dividend is declared. Possibly great inconvenience might arise to secured creditors where they might be proceeding to realize their securities, but might be prevented by circumstances from realizing before the

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time at which the trustee proposed to declare a dividend, and possibly injustice might in that way arise. But it appears to me that a conclusive answer to that objection is given by reference to the very comprehensive sect. 72 of the Act, which enables the Court to provide a remedy for every wrong which might otherwise be done in the distribution of the assets, and to give proper effect to every just claim, whether of a secured creditor or any other. A creditor who was placed in any such difficulty might apply to the Court for leave to enter something equivalent to what was called a claim under the old practice, and for an order that the trustee should reserve a sufficient sum to meet the claim, if it should ever be made good, and the power of the Court is unlimited. Upon the plain words of the Act, it appears to me that the bank had not put themselves in the position to say that there was any debt provable in bankruptcy in respect of which a dividend ought to have been declared, or in respect of which a dividend ought to have been reserved to wait for the realization of their securities. I think that the order ought to be discharged.

BRETT, L.J.:—

The claim against the trustees is founded upon the assertion that they had had so notified to them the particulars of the debt or claim of the bank as to oblige them, if they declared a dividend, to make a sufficient reserve for the bank. I think that the claim against the trustees fails on this ground, that the bank had not, before the dividend was declared, sent in any claim or proof of which the trustees were bound to take any notice. The trustee before declaring a dividend is bound to give notice, and if, after that notice is given, the particulars of a debt or claim are properly notified to him, he is bound to make a sufficient reserve for it. He also is bound to make a reserve for the debts which are inserted in the debtor's statement of affairs. Now, as I understand it, in the present case the trustees had no notice from the debtor's statement of affairs of any debt being due to the bank, because, although it was therein declared that there was a debt due, yet at the same time it was stated that the bank held securities of larger value than their debt, so that in fact the statement of affairs disclosed no debt due to them. The trustees,

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therefore, were not bound to make any reserve on that account. But they did give the notice which is mentioned in the 312th rule, that they were about to declare a dividend. Now upon that, at one time the bank did send in what they called a proof, but I think it is sufficient to say that it was withdrawn, and that it is not now relied upon as a proof. Then there was a correspondence, and in that correspondence the bank did say that there was a debt due to them, and that they held securities for it, and they said that they were about to realize those securities. I think that the true construction of the correspondence is, not that they did not intend to realize the securities, not that they meant to take their own time and to realize the securities at their own will and pleasure—but that they were about to realize them as soon as they could. I quite agree that they gave the trustees notice that there would be a proof sent in finally in strict form, that is to say, that at some future time the bank would send in a proof which would state the amount of the debt due to them and the amount realized by the securities, and would contain a claim for the balance. The question, therefore, is whether, in order to impose upon the trustee the obligation to reserve a dividend, it is sufficient to give him notice that a proof or a claim in due form will be sent in, or whether it is not necessary that there should be a claim sent in in such a form as that, if it were true, it would amount to a proof of the debt claimed; in other words, whether, in the case of a secured creditor, he must not, before the dividend is declared, have sent in particulars shewing the amount he claims as a debt, and the amount which he has realized from his security, or giving a valuation of his security. The conclusion at which I have arrived (certainly not without difficulty, for I do not believe that any of the questions which arise under the *Bankruptcy Act* and Rules are without difficulty) is, that the notification of the debt must go to this extent: It must contain the particulars of the debt—an assertion of the amount of the debt—it must contain the particulars of the security—and it must either assert that that security has been realized, and has realized a certain sum, or it must put a value on the security if it has not been realized. Now, supposing that those particulars are sent in, it may be that the trustee is inclined or is advised to dispute them, and then, as it seems to

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me, the question of reserving a dividend arises. If he is determined to dispute the accuracy of the representation so made to him, he may, I think, declare a dividend, but if, after a claim has been made upon him in that form, he does declare a dividend, he is bound to make a sufficient reserve in respect of the claim, and if he does not he will have failed in his duty. To my mind that is the true construction of the 312th rule. But before the trustee is called upon to make any reserve, or to consider whether he will allow or disallow the claim, the claim must have been sent in in the form which I have mentioned. I think it might be tested in this way: Suppose that at the moment the dividend is declared the trustee had rejected the claim, or what is called the proof, and the creditor maintained that it was sufficient in form, and suppose the matter were brought before the Court upon that dispute, the claim being in the form in which it was in the present case, without either a statement that the security had been realized or a value being put upon the security, could the Court say that it was a sufficient claim in form? In my opinion the Court must say that it was not in the right form, that it ought to be rejected, and that there was nothing which the trustee was bound to consider. It seems to me that the 272nd rule confirms this view. It states expressly that if the creditor has not realized his security he must value it, and unless he has done the one or the other he cannot prove, and, if he cannot prove, he cannot claim to prove. The difficulties which suggested themselves to our minds during the argument, and which are not easy to overcome, the difficulties which may in practice lie in the way of a creditor who is thus called upon either to realize or to value his security, and who cannot realize, and yet, according to our ruling, must value his security if he is to go on with his proof, are, I think, met by the 72nd section, which seems to me to give full power to the Court, and, therefore, the right to the creditor to come to the Court and say, "I cannot realize my security yet, and I am therefore bound to value it, but the practical difficulty is so great that I ask the Court to give me relief by postponing the declaration of a dividend," and under sect. 72 he would in a proper case get that relief. If there was any such difficulty on the part of the bank in either realizing or valuing their securities, that was their

remedy. They did not follow that remedy. Before the dividend was declared they had not sent in to the trustees any claim or proof, or notification of claim or proof, which bound them to do anything, and under those circumstances the trustees were in no way in default.

COTTON, L.J. :—

The question which we have to consider is whether, under the circumstances, the trustees can be held personally liable. They have in fact been held personally liable for the exact amount of the dividend paid to the other creditors on a division of all the assets then in hand, and Lord Justice *James* has pointed out that that is a clear inaccuracy in the order. Indeed, it appears to me that the inaccuracy goes to a greater extent than he suggested, because, if the trustees are held liable on the ground that a reservation ought to have been made for a secured creditor, that must apply, not only to the bank, but to all the other secured creditors, whose debts, as I understand, amount to something like £20,000. The question really is whether there was a right to a reserve, whether the bank had a right to claim that there should be a reserve, and whether the trustees are personally answerable for not making any reserve.

Undoubtedly, up to the 16th of January, before which time the dividend had been declared and paid, the bank were not in a position to prove; that is quite clear. Under sect. 40, they could only prove if they either valued or realized their security, and that they did not do. The question which we have to consider is whether, under the circumstances of the case, they were entitled to require the trustees to make a reserve for whatever they might ultimately prove themselves to be entitled to prove for. The argument was based partly on the Rules and partly on the sections of the Act of Parliament. It was said that the trustee is bound to give notice to the creditor that he is going to declare a dividend, so as to enable him to realize or to value his security; that he has power to compel the realization of the security, and that he ought to make a reserve for the claim if that is not done.

Let us see how the matter stands. Could the trustees in this case have compelled the realization of the security? Rule 136,

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upon which the Chief Judge seems to have relied, has, in my opinion, no application to the present case, because it applies only to the case of a creditor who desires to value instead of realizing his security, and even in that case, as I understand it, the trustee has no power to compel the realization of the security directly, by taking the realization into his own hands, or by calling upon the creditor to realize. As I understand rule 136 it means only this—the creditor wishing to prove says, "I value my security at such a sum," and if he does not state a value with which the trustee is satisfied, then the trustee may say, "No, you shall not prove on a valuation, but you must realize your security before you prove," and in that way, no doubt, the trustee can indirectly compel the creditor to realize. But he has no direct power to compel realization. And that certainly is the case here, where, so far as I can see, there is nothing whatever (independently of rule 136, which is not applicable to the present case) which is supposed to give the trustee the power to compel realization, except that he cannot permit any secured creditor to come in and prove until he has either valued or realized his security. What, then, can he do? It was suggested that the case comes under sect. 31 of the Act, because, of course, if a reserve is to be made, we must consider for what it is to be made. I think that sect. 31 has no application to such a case as the present. A secured creditor can only prove for the balance of his debt, after deducting the estimated or actual value of his security. Under sect. 31 a creditor is to be admitted to prove for the estimated value of his debt or liability, and it applies, not to the case of a secured creditor, who can only come in as a creditor in the bankruptcy for the balance due to him after realizing or valuing his security, but to the case of claims which are doubtful by reason of a contingency or otherwise, and which must be valued, and for which when valued the proof is to be made, not for the ultimate out-turn, but for the estimated value. In my opinion, under sect. 31 there is no power for the trustee to make any estimate of the ultimate balance due to a secured creditor. That being so, how does it stand on the other hand with the creditor? The creditor if he thinks fit has the right and the power to ascertain the amount of his claim. He has the right and the power to say, I will value this security, and putting such a value upon it, I

come in and prove as a creditor for the balance. Of course that ultimate amount may be, under certain circumstances, not a debt provable, but only a claim, because the debt may be disputed for some reason independent of the value of the security. But the creditor has a power, which, as I understand, the trustee has not, to fix a definite sum for which he is either entitled to come in and prove, or to stand as a person who would be a creditor independently of the question of security, unless there is any objection to his being treated as a creditor.

If that is so, we ought, in my opinion, to find very strong words in the Act to justify us in holding that there should be a reserve made in favour of a person who may or may not turn out to be a creditor, and who has in his own hands the power of fixing the amount for which he is to be a creditor, while the trustee on the other hand has no such power. I will not repeat what Lord Justice *James* has said about sect. 42, as I perfectly agree with it. I shall refer presently to sect. 43 on the question whether the trustees are to be personally liable. The County Court Judge relied on this, that notice of the intention to declare a dividend ought to have been given, so as to enable the bank to realize or to value their security. But in fact that notice was given. In bankruptcy, notice has to be given according to Form No. 49 when a dividend is intended to be declared, and creditors who have not proved their debts are required by that notice to come in and prove by a certain day or they will be excluded. In liquidation the notice (Form No. 125) is the same in substance, though different in form, because it requires all those creditors who have not already proved to come in and prove by a certain day, with a notice that if they do not they will be excluded from the proposed dividend. That notice was given in the present case in the way which the Rules require in the case of liquidation by arrangement.

That being so, what I consider a proof was sent in by the bank. It is in the form of a proof. The person making the affidavit swears that he has been appointed under the common seal of the banking company to make proofs on their behalf in bankruptcy. If it was not a proof, but only an affidavit filed for the purpose of enabling an arrangement to be made, why was it made in that form? It was clearly a proof—a claim to prove for the full amount of the

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debt without valuing or realizing the security, and it was very properly rejected. It is very true that afterwards a notice was given to the trustees that, although they had rejected that proof and the bank did not object to the rejection, yet the bank would send in a claim afterwards, if it should turn out to be necessary for them to do so when they had realized their securities. Now, is there anything in the rules which requires a reserve to be made for such a claim as that? Rule 312 provides that, "on declaring a dividend, a sufficient reserve shall be made by the trustee for such dividend upon all debts or claims notified to him in pursuance of such notice." In my opinion, that cannot mean that if a proof has been sent in and rejected, the trustee is still to make a reserve for it. That case is dealt with by rule 313, which enables a person whose proof has been rejected to go to the Court and have the matter dealt with. Then we come to rule 314. [His Lordship read it.]

Can it be said that in the present case the bank had sent to the trustees a proof of their claim? What they had said was this: "We think you are right in rejecting our proof; we shall not go to the Court. We intend to realize, and possibly after realization we may be in a position to make some claim against the estate, but we hope that will not be the case." It is very true they say, "it may turn out that we shall be creditors for a balance after we have realized our security; whether that will be so or not depends upon the outcome." But can that be a claim such as to enable or require the trustee to set aside a sum in order to meet it? I think, having regard to the Act and the Rules, that, in order to oblige the trustee to make any reserve for a debt, there must be a claim for some sum certain or a claim for a sum in the nature of a contingency capable of being estimated under sect. 31, where the trustee can fix the amount, and fix the amount for which, if the security is a good one, the man is to be admitted as a creditor. But here, where there was only a contingency that the bank would have any claim at all, and they did not state in their particulars for what the claim would be, though they had it in their power so to do, I think the trustees were not under any obligation to make a reserve to answer that supposed claim.

But, if there was such an obligation, can it be said that the

trustees' neglect to make a reserve will render them personally liable in the way of an action for damages against them by the creditors? As I have already said, the trustees could only guess at that which the bank themselves could make a certainty, the amount for which the claim should be made if a proof was to be tendered. Then look at sect. 43 of the Act. [His Lordship read it.]

This shews that the claim of the bank is simply against any moneys for the time being in the hands of the trustees, not against them at least where, as here, there is no ground for saying that they must have known that there would be a deficiency in realizing the security. Under these circumstances the creditor is not to make the trustee liable if he has not made a sufficient reserve, but only to have a claim against whatever reserve the trustee may have made, or whatever funds may afterwards come into the bankruptcy, before any other dividend is paid to any other creditor. His remedy is only against the assets, not against the trustee personally.

In my opinion, having regard to the Act and the Rules, although they are not very clear, there was no necessity or right in the present case to call upon the trustees to make a reserve, and certainly nothing which can make the trustees personally liable to the bank for not having made a reserve. If there should be any difficulty in the case of a secured creditor, from his inability to value or realize his security before the declaration of a dividend, I am of opinion that the Court would, on his application, have power, under sect. 72, to give a remedy by making any order that might be just.

JAMES, L.J.:—

The order will be discharged with costs in all three Courts. But, of course, this will be without prejudice to any application by the bank for payment of a dividend out of any future assets.

Solicitors for Trustees: *Walker & Co.*, agents for *Walker & Son, Dewsbury.*

Solicitors for Bank: *Bischoff, Bompas, Bischoff, & Co.*

C. A.
1879
V.-C. B.
Aug. 2.

C. A.
1880
March 22.

In re MIDDLESBOROUGH ASSEMBLY ROOMS COMPANY.

Winding-up—Companies Act, 1862, *s.* 79, *sub-s.* 2—*Shareholder's Petition.*

A company which was formed for building and using and letting assembly rooms, bought the site and carried the building up to the level of the street by the end of 1875. Shortly afterwards trade in the neighbourhood became depressed, and the directors, with the sanction of the great body of the shareholders, resolved to proceed no further till times improved. In July, 1879, a shareholder presented a petition for winding up, on the ground that the company had suspended business for more than a year. It was stated that the sum which could still be raised by calls was sufficient to erect rooms, though not on so large a scale as originally proposed, but it was not alleged that the company could carry on the proposed business at a profit. Fully four-fifths in value of the shareholders opposed the winding-up, which was supported by about one-eighth in value :—

Held, by the Court of Appeal, reversing the judgment of *Bacon*, V.C., that a winding-up order ought not to be made.

THIS was a shareholder's petition to wind up the *Middlesborough Assembly Rooms Company*, which was incorporated in 1874 for the purpose of purchasing a Quaker's meeting house, converting it into assembly rooms, and using and letting the rooms for any legal purposes productive of profit and not injurious to the premises.

The original capital was £20,000, in 2000 shares of £10 each, which in 1875 was increased to £30,000 by the creation of 1000 new shares. 1577 shares were allotted, of which 300 had, before the present proceedings, been forfeited, and the holders of seventy more were in liquidation.

The meeting-house and some adjoining land were purchased, and plans for the building obtained. A contract was entered into for excavating the ground and bringing the buildings up to the level of the street. This contract was carried out by the end of 1875. The purchase-money and the sums expended in these works amounted together to about £7000.

Tenders were sent in for the completion of the building according to the plans which had been prepared, but it was found that the work would be more expensive than had been expected, and the directors therefore took time to consider the plans, with a view to their modification.

In 1876 the staple trade of the district became very depressed, and such depression continued. The directors considered that under these circumstances it was desirable to wait for better times. The shareholders, who were from time to time consulted on the subject, agreed in this view, and no steps were taken towards completing the building.

On the 26th of May, 1879, the directors laid before an extraordinary general meeting of shareholders the following statement as to the affairs of the company:—

"*Liabilities.*

Mr. *Jobson*—Mortgage . . .	£2000	0	0				
Ditto Interest 3 months .	25	0	0				
				£2025	0	0	
Middlesborough owners—Unpaid purchase-money	£800	0	0				
Ditto Interest to date	206	13	11				
				£1006	13	11	
Architect				200	0	0	
Other creditors				60	1	8	
				£3291	15	7	

Assets.

Cash in hand	£51	17	7			
Unpaid calls recoverable . .	151	0	0			
£2 per share June 4th on 1177 shares, being number in hands of good holders, will produce . . .	2354	0	0			
Further call of 15*s.* per share will produce	882	15	0			
	£3439	12	7			
Deduct liabilities .	3291	15	7			
Surplus . . .	£147	17	0			

and the sum of £3 5*s.* per share uncalled in addition to the company's property clear of all liability."

At this meeting, which was numerously attended, a motion was carried unanimously "That the whole matter be left in the hands of the directors, with a recommendation that they make a call of

C. A. 1880 — *In re* Middlesborough Assembly Rooms Company.

such an amount as will pay all the debts of the company, and leave the property intact in the hands of the shareholders free from all claims for interest or any other liabilities."

The call of £2 per share mentioned in the above statement was paid by all the shareholders not in liquidation, except by the Petitioner, who was the holder of fifty shares, and three other shareholders.

Judgment was signed against the Petitioner for the amount of call and costs (£104 7*s.* 8*d.*), which was afterwards paid by him under protest. There remained the sum of £4 per share liable to be called, the proposed call of 15*s.* per share not having been made.

The petition for winding up was presented on the 15th of July, 1879, under the *Companies Act*, 1862, s. 79, on the ground that the company had suspended business for more than a year, and that it was a case in which it would be just and equitable that the company should be wound up.

At the present time there were on the register forty-seven shareholders with 1277 shares. Of these thirty-four, representing 960 shares, had signed a declaration stating that they disapproved of the petition, and believed that to wind up the company would be detrimental to the interests of the company and of all concerned. The petition was supported by the holders of 110 shares, besides the Petitioner.

In his affidavit in opposition, the secretary stated that the total liabilities of the company, including the balance of the purchase-money and interest were under £1200, and that £4828 could be raised by calls; that no pressure for payment had been placed upon the company by any of the creditors; that if the property of the company were realized in the present depressed state of trade in the district there would be very great loss indeed, whereas, from the central position of the site, the proposed building under other conditions than those now existing would have been a very profitable undertaking; that although the company had not completed the construction of the proposed building, they had not neglected the property, but had adopted all necessary measures for its protection, and any delay that had taken place in completing the proposed building had been at the request and with the sanction of

the shareholders in meeting assembled; that the money assets of the company, including the proposed call of 15*s.* per share, would leave a small balance after payment of all liabilities, leaving the property which had cost about £7000, and the balance of liability on the shares of £3 5*s.*, as available assets of the company beyond its liabilities; and if all the shares were fully paid up there would be sufficient to enable the company to construct a building not certainly of the size originally contemplated, but sufficiently accommodating to meet the present requirements of the district. By another affidavit he deposed that the affairs of the company were carried on at very small expense, the only expense of management being a trifling salary to the secretary, and the directors never having claimed any fees.

The petition was heard before Vice-Chancellor *Bacon* on the 2nd of August, 1879.

Hemming, Q.C., and *Phipson Beale*, in support of the petition.

Sir *H. Jackson*, Q.C., and *Romer*, for the company:—

No sufficient case is shewn within the *Companies Act*, 1862, s. 79, for winding up this company on a shareholder's petition, the petition of a shareholder who has been compelled to pay his calls under the pressure of a judgment. The company is not insolvent, and has not suspended business, but is merely taking no active steps until the present depression of trade has blown over. The property, which is valuable, cannot at the present time be realized without serious loss, and the wishes of the great majority of the shareholders who oppose the petition and wish the property to be preserved until better times for carrying on the business have arrived, will not, unless upon very strong grounds, be disregarded: *In re Langham Skating Rink Company* (1).

BACON, V.C., said that it was the very case contemplated by the Act of Parliament. Not one single thing had been done in performance of the purposes for which the company was incorporated. The directors proposed to stand by and wait for better times, but not even the secretary, who had made an affidavit in

(1) 5 Ch. D. 669.

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opposition to the petition, ventured to say that the business could be conducted with profit to any one. The Petitioner, as a shareholder, ought not to be bound for all time to an unsuccessful concern. It was exactly the case for granting a winding-up order, for which there must be the usual order.

The company appealed. The appeal was heard on the 22nd of March, 1880.

Romer, for the company:—

The position of a shareholder who petitions for winding up is quite different from that of a creditor. A creditor is entitled to a winding-up order *ex debito justitiæ*, but in the case of a shareholder the Court has a discretion: *In re London Suburban Bank* (1). I should contend that the suspending business for a year mentioned in the *Companies Act*, 1862, s. 79, sub-s. 2, means suspension owing to inability to carry on the business, which is not the case here; but supposing we are within the section, still the Court will in its discretion dismiss a shareholder's petition when it is opposed by the great mass of the shareholders, unless there are special circumstances.

Hemming, Q.C., and *Phipson Beale, contrà*:—

There is no doubt that the Court has a discretion, but we contend that it would not be reasonable to exercise it in the way now asked. It is not reasonable that a body of shareholders should keep the undertaking hung up for an indefinite length of time, when it has indisputably become impossible to carry out the scheme according to the original design. The company do not say that they can erect a building according to the original plan, or any building from which profits can be made: they only say that they can erect a building which may serve the purpose.

[JAMES, L.J.:—You say that the company has suspended its business. What is its business?]

To build assembly rooms and let them.

[BRETT, L.J:—Building assembly rooms can hardly be called a business. Does the business begin till the rooms are built?]

(1) Law Rep. 6 Ch. 641.

If not, they have let five years pass without commencing business, which makes my case stronger. But even if they have made a beginning, and then for more than twelve months do nothing towards carrying out their objects, that must be looked upon as suspending its business. The case of the *Tumacacori Mining Company* (1) is in our favour as to not attending to the wishes of the majority in a case thus circumstanced. There is only £3600 left to build the rooms, which is an absurdly inadequate sum.

Romer, in reply:—

As regards the insufficiency of the funds, there will be no difficulty in borrowing, as we shall have the site free from incumbrances. The Court will not disregard the wishes of such a great majority of the shareholders.

JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor cannot be sustained. I agree with him that the company has suspended its business for a year within the meaning of the *Companies Act*, 1862, sect. 79, and that the Court, therefore, has jurisdiction to make a winding-up order. But the Act directs the Court to have regard to the wishes of the contributories. Here a great majority of the shareholders are opposed to a winding-up, and desire to be left to manage their affairs for themselves. We ought not to disregard the wishes of so large a majority unless we see in their conduct something unreasonable, something like tyranny, something amounting to an injury of which the minority have a right to complain. The company, from time to time, without any protest on the part of the Petitioner, resolved to postpone the taking any steps to effectuate its objects. At last, at a meeting held a few weeks before the presentation of this petition, the shareholders resolved to leave the matter in the hands of the directors. This appears to me to have been a very reasonable thing for them to do, and it would be a strong proceeding for the Court in a matter of this nature to overrule the decision of the great bulk of the shareholders.

(1) Law Rep. 17 Eq. 534.

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If a winding-up order were made, what would be the result? A winding-up is not wanted for the purpose of paying debts. No impropriety of conduct on the part of the directors is shewn. No expenses are being incurred except a small salary to the secretary and the interest which is running on a sum not exceeding £1200. The assets are the site and the basement floor of the intended building which has been erected in skeleton up to the level of the street. If the order is maintained this property must be sold, and the negative quantity which will remain after payment of the £1200 debt and the costs of the winding-up, divided among the contributories. That would be the practical result. Now, is it worth while to go through all the expense of a compulsory winding-up in order to do what the company can do much better for themselves, if, after taking a reasonable time to consider, they determine not to go on with the undertaking? The Petitioner cannot become liable for further calls beyond the proposed 15*s.* per share unless the concern goes on, and we cannot suppose that the shareholders will determine to go on unless they see a fair prospect of success. I think that the petition ought to be dismissed.

BRETT, L.J.:—

I am of the same opinion.

COTTON, L.J.:—

I also am of the same opinion. A creditor who petitions for winding up stands in a very different position from a shareholder. His only means of getting paid is by means of a winding-up order, and he therefore has a right to an order when the circumstances are such as to give jurisdiction to make one. But a shareholder is in a very different position, and though the circumstances are such that the Court can make a winding-up order, it has a discretion as to whether it will make one on his application.

The Petitioner acquired his shares in 1874. In 1876 the company ceased taking any steps to carry out their undertaking, and, as I agree, suspended business for more than a whole year. The Petitioner does nothing till 1879, and then almost immediately after the meeting of May in that year, at which the resolution

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referred to by Lord Justice *James* was passed, he presents this petition. If he could satisfy the Court that the business of the company had been suspended on account of inability to carry it on, or by reason of an intention to abandon the undertaking, the case would be very different. It is true that there is no evidence that the company will proceed with their building within any given time, but I cannot look upon the delay as arising from anything but a wish to wait for a time when the business can be carried on more profitably than at present. Under these circumstances, I think that a winding-up order ought not to be directed when a vast majority of the shareholders wish to go on, and the only result of a compulsory winding-up would be a great and unnecessary expense.

Solicitors for Petitioner: *Bower & Cotton.*
Solicitors for Company: *Hollams, Son, & Coward.*

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C. A.
1880
V.-C. B.
Jan. 23, 24.
C. A.
March 17.

[1873 W. 151.]

Time limited for Complaint to Justices—Expenses of Sewering and Paving Roads—Cross-notice by Owner on whom Demand for Payment of Apportionment has been made, disputing the Amount, and disputing the Liability—Distinction between Jurisdiction of Justices and Jurisdiction of Arbitrator—Jervis's Act (11 & 12 *Vict. c.* 43), *s.* 11—*Public Health Act,* 1848 (11 & 12 *Vict. c.* 63), *ss.* 68, 69, 123, 129—*Local Government Act,* 1858 (21 & 22 *Vict. c.* 98), *ss.* 62, 63.

Notices to sewer and pave roads having been, in 1872, served by a Board of Health on an owner, he took no notice during his lifetime, and the works having been executed by the board, notices to pay apportionments were on the 30th of July, 1875, served on the tenant for life under the will of the owner, and on the executors, who within the statutory three months served counter-notices on the board, disputing the amount of the apportionments, and alleging that the roads were public roads. The board then commenced proceedings by arbitration, which the owners refused to attend, and in their absence an award was made in favour of the board on the 9th of August, 1877. On the 19th of January, 1878, the award was made a rule of the Queen's Bench Division. On the 12th of February notices of demand were served by the board on the owners, and on the 9th of July, 1878, proceedings in the Queen's Bench Division to enforce the award were commenced

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and subsequently abandoned. On the 1st of August, 1878, proceedings were taken in the Queen's Bench with reference to the costs of the award, and these, on the 23rd of January, 1879, were transferred to the Chancery Division, in which an administration action was pending:—

Held, by *Bacon*, V.C., that, where a notice, served by a Board of Health upon an owner, calling upon him to pay an apportionment of expenses incurred in the sewering and paving of roads, is met by a counter-notice disputing the amount alone, such demand may be the subject of arbitration; but where the counter-notice disputes the liability to pay, such a demand must be tried by justices, who, if the counter-notice also disputes the amount, may exercise their jurisdiction as to the amount also.

Held, by *Bacon*, V.C., and by the Court of Appeal, that a summons by the board for leave to prove in the administration action for the amount awarded must be refused, on the ground that the remedy of the board was by a summary proceeding before justices, and had become barred by the operation of *Jervis's Act*, 11 & 12 Vict. c. 43, s. 11.

IN November, 1872, notices to sewer, level, and pave three roads at *South Park, Reigate*, were served by the Corporation of *Reigate*, acting as a Local Board of Health, upon *John George West*, the testator in the cause, and other owners of premises adjoining those roads respectively, under a power conferred by sect. 69 of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), the powers of which statute were extended and defined by sects. 61 to 64 of the *Local Government Act*, 1858 (21 & 22 Vict. c. 98). Both statutes have since been repealed by the *Public Health Act*, 1875 (38 & 39 Vict. c. 55). The owners disregarded the notices, and on the 11th of May, 1873, the testator died. The corporation executed the work.

The suit was instituted for the administration of the estate of *J. G. West*, by the infant children of Mrs. *West*, the tenant for life under the will, against *Mary Ann Downman*, spinster, since Mrs. *Gelder*, *John Sisson Steele*, and *Alfred Sayer Edmunds*, the executrix and executors of the will, of whom *Steele* and *Edmunds* only proved, and the latter became the acting executor. On the 26th of July, 1873, an administration decree was made.

On the 16th of June, 1875, the surveyor of the board settled the proportions payable in respect of the testator's property of the expenses of the work done on the roads respectively at £44 4*s.* 5*d.*, £10 14*s.* 6*d.*, and £11 2*s.* 3*d.*

On the 6th of August, 1875, three notices, dated the 30th of July, to pay the said apportioned parts of the expenses were affixed to

the premises: and on the 29th of October, 1875, cross-notices were sent by post by Mrs. *West* and the executors to the Mayor, disputing the apportionments, and alleging that the roads were public highways, repairable by the inhabitants at large.

On the 9th of November, 1875, three notices demanding payment of the said expenses were served on Mrs. *West* and on the executors.

On the 4th of March, 1876, the clerk to the Local Board wrote to ask Mrs. *West* and the Defendant *Edmunds* to agree to a single arbitrator under sect. 123 of the *Public Health Act*, 1848. This was declined.

On the 8th of July, 1876, the time for adjudicating upon debts claimed to be due from the estate having expired, the board, who had omitted to send in any claim under the advertisement, applied by summons to be allowed to prove for their claim as a debt in the action. This summons was, on the 12th of July, dismissed with costs, and the order dismissing the summons was not appealed from.

On the 4th of August, 1876, the Chief Clerk made a certificate, whereby he certified that there was no debt due from the testator's estate remaining unpaid.

On the 28th of June, 1877, the board served the Defendant *Edmunds* with notice of the appointment of an arbitrator on behalf of the board under the arbitration clauses (123–128) of the *Public Health Act*, 1848; and on the 21st of July, 1877, the Defendant *Edmunds* wrote to the solicitor of the board as follows:—

"This matter has been brought before the Chief Clerk in the suit of *West* v. *Downman;* and he has directed me on behalf of the executors to give you notice that, as one of the executors' objections to your claims is, that these roads are public highways, the executors are not to appoint an arbitrator or attend the proceedings before the arbitrator appointed by you.

"I beg to point out that you are out of time, and that the arbitration clauses relate only to private roads. Any attempt to enforce payment of any amount fixed by your arbitrator will be resisted on these and other grounds."

The Defendant *Edmunds* did not attend the arbitration, and the

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board went on in his absence, with the result that on the 9th of August, 1877, the arbitrator made an award confirming the apportionments. On the 19th of January, 1878, the award was made a rule of Court; and on the 7th and 6th of February, 1878, the Plaintiff, Miss *West*, and the Defendant *Edmunds* were personally served with a copy of the rule.

On the 12th of February 1878, Miss *West* and the Defendant *Edmunds* were served with a notice demanding payment within fourteen days.

On the 9th of July, 1878, a summons in the Queen's Bench Division was served on the Defendant *Edmunds* to shew cause why judgment should not be signed for the amount found due on the award; but after two or three adjournments this summons was on the 15th of July, 1878, abandoned.

On the 1st of August, 1878, the corporation obtained a rule *nisi* for a mandamus for the Master to tax the bill of costs of the solicitor of the board, and served it on the executors and the tenant for life. On the 5th of November, 1878, the rule was made absolute, but no order was made as to costs. On the 20th of December, 1878, a rule *nisi* was granted for the payment of the costs of the mandamus.

On the 23rd of January, 1879, *Edmunds* moved before Vice-Chancellor *Bacon* for an order restraining the corporation from taking any further proceedings to enforce the award, and transferring the proceedings in the Queen's Bench Division to Vice-Chancellor *Bacon's* branch of the Chancery Division. The Vice-Chancellor made an order transferring the proceedings in the Queen's Bench Division to the Chancery Division, and directing that the corporation should be admitted as creditors against the estate of the testator for the amount awarded, and for the costs of the award and certain other costs. (See Ord. June 1876, r. 18.)

The latter part of this order was appealed from, and on the 30th of April, 1879, was reversed by the Court of Appeal, on the ground that the question whether the board were entitled to prove was not before the Court, but without prejudice to the claim of the board to prove against the testator's estate.

A summons was accordingly taken out on behalf of the board, for an order that, notwithstanding the Chief Clerk's certificate

of the 4th of August, 1876, they might be admitted as creditors against the estate.

Daniel Jones, for the summons.

Sir *H. Jackson*, Q.C., and *F. T. White*, for the Plaintiff, Miss *West*.

Lambert, for Mrs. *West*, the tenant for life.

Hemming, Q.C., and *B. B. Swan*, for the Defendant *Edmunds*:—

The applicants are out of time, and the claim must, on this account, fail.

By sect. 11 of the *Administration of Justice* (*No.* 2) *Act*, 11 & 12 Vict. c. 43, commonly called *Sir John Jervis's Act*, it is provided in general terms that in all cases where no time is specially limited by Act of Parliament for making complaint to justices of the peace, such complaint shall be made within six calendar months. The dispute in this instance was not merely the amount of the apportionments, it was whether the Respondents were liable or not. That was a question within the jurisdiction of the justices, under sects. 129 to 140 of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), explained and amplified by sects. 61 to 67 of the *Local Government Act*, 1858 (21 & 22 Vict. c. 98).

That proceedings under sect. 69 of the *Public Health Act*, 1848, which by virtue of the *Local Government Act* (1858) *Amendment Act*, 1861 (24 & 25 Vict. c. 61), s. 24, have been taken in a County Court, the amount in dispute being under £20, are subject to the six months' limitation, appears from *Tottenham Local Board of Health* v. *Rowell* (1). In that case Lord Justice *James* observed: "So long as the claim can be enforced before justices, it may be sued for in the County Court: but when the six months have gone by, the jurisdiction of justices is clearly at an end, and therefore no alternative remedy can exist."

The case of *Tottenham Local Board of Health* v. *Rowell* came subsequently before Vice-Chancellor *Malins* on the 20th of January, 1880, when an explanation of sect. 62 of the *Local Government Act*, 1858, was given by the Court, and it was shewn that the expenses

(1) 1 Ex. D. 514.

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can become a charge on the premises under that section only after the remedy by summary proceedings before justices, or the remedy in the County Court, has been tried, and has failed; and consequently only within the six months prescribed by *Jervis's Act.*

Daniel Jones, in reply:—

Even if the case be within the six months' limitation prescribed by *Jervis's Act* at all, the board are not out of time. Their notices were met by counter-notices under sect. 63 of the *Local Government Act*, 1858, disputing the amount, and hence did not, under that section, become binding and conclusive upon the owner. Disputed questions arising under the *Public Health Act*, 1848, as to the amount of an apportionment of this kind payable by an owner are a proper subject for arbitration, and until an award is made, the jurisdiction of justices does not arise. The arbitrator fixes the amount, and then the justices, in exercise of their summary jurisdiction, make an order to enforce payment. In exercising their summary jurisdiction, justices exercise a judicial office only to the extent of seeing that the person against whom the order is made is the right person, that there has been an assessment, and that the proportion to be paid has been fixed by the proper authority. In other respects, their duties are simply ministerial: *Cook* v. *Ipswich Local Board of Health* (1). In this case the award fixing the amount payable was not made until the 9th of August, 1877, and we served our notice of demand thereunder on the 12th of February, 1878. From that time, and not before, the six months' limit began to run, if at all: *Grece* v. *Hunt* (2); and our proceedings in the Queen's Bench were taken within six months of that date.

But the case is really not within *Jervis's Act* at all. By sect. 62 of the *Local Government Act*, 1858, these expenses have become "a charge on the premises in respect of which they were incurred," and hence we have a remedy for recovering them which is not barred by the six months' period of limitation prescribed by *Jervis's Act.*

BACON, V.C., after observing that the question was left entirely

(1) Law Rep. 6 Q. B. 451, 463. (2) 2 Q. B. D. 389.

open by the order of the Court of Appeal of the 30th of April, 1879, continued:—

The law upon the subject is contained in the statutes which have been referred to—statutes which contemplated the necessity of works of this kind being executed, and which provided the means whereby payment for such works should be made and enforced. The appropriate, and as I must now regard it, the only, remedy for enforcing that payment is provided by the enactments of the *Public Health Act*, 1848. The surveyor of the corporation made a valuation of the cost of the works done by the corporation, and he apportioned that amount amongst the several owners. Then a demand was made for payment, and if that demand was not complied with, proceedings for ascertaining and recovering the costs and expenses should have been taken before the magistrates. The jurisdiction of the magistrates extended not only to the amount to be recovered, but to the question of the liability of the persons charged.

In this instance, notices were served on the owners by the present applicants, and cross-notices were sent by the owners, so that the very question of right on the one hand and of liability on the other, which the Legislature had directed should be decided by the magistrates, arose. Then the applicants failed to take those proceedings before the magistrates within the time which the Legislature, for very wise reasons, has limited as the period within which they shall be taken. It is true that the *Public Health Act*, 1848, provided that where the amount demanded was in dispute, that amount might become the subject of arbitration. But if the question of liability had gone in the first instance, as it ought to have gone, before the justices, they would have decided that question without reference to the question of amount. The meaning of the statute was, that if the amount only was in dispute, the question might be the subject of arbitration; but if the liability to pay anything was in dispute, the question had to be settled by the justices. The mistake, as I conceive, which was made was, in supposing that where the amount was in dispute, the jurisdiction of the justices did not exist, or at least need not be resorted to, and that the question was one for an arbitrator. But that is not so. The justices, upon hearing the case, might have

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held that the objection on the ground of liability was not sustainable by the present Respondents. If the justices had then been informed that the amount was also in dispute, they might have made such order in the matter as they thought fit, and they might have directed payment of the amount claimed.

That is the way in which the matter was left. From that time till now the parties have gone on, misunderstanding, as I think, the meaning of the Act of Parliament; and the decision of Vice-Chancellor *Malins*, which goes into the subject very fully, shews plainly that the view I take of the statutes is the correct one—namely, that by the statute of 11 & 12 Vict. c. 43, a limit of time was placed on the exercise of the authority conferred by the *Public Health Act*, 1848. In either case a mistake was made in trying to have recourse to a proceeding which was beyond the scope of the Act of Parliament. The question being one of liability, and not of amount merely, should first have been brought before the justices, and should not have been attempted to be made the subject of arbitration.

Then what followed was that the applicants erroneously went on with the arbitration, which the Respondents refused to attend; and an award was made—the whole proceeding being tainted by the original vice of having been instituted before an arbitrator instead of before two justices. The applicants endeavoured to enforce the award in the Court of Queen's Bench and failed; and now the only question before me is whether the corporation, having failed within the time prescribed by the statute to take the easy, familiar, and inexpensive remedy afforded by the Act of Parliament, are at liberty to make the present application. Having regard to the provisions of the *Public Health Act*, 1848—having regard to the limit of time fixed by Sir *J. Jervis's Act*—having regard to the decision which was referred to in the Court of Exchequer, and to the more recent decision of Vice-Chancellor *Malins*, by which I am not bound, but which I thankfully accept as a guide in the determination of this case, I am of opinion that the applicants are not in time, and that the summons must be dismissed with costs.

C. A. The corporation appealed. The appeal was heard on the 17th of March.

Westlake, Q.C., and *Daniel Jones*, for the Appellants:—

Disputed questions as to an apportionment of this kind are proper subjects for arbitration, and the jurisdiction of justices cannot arise until there is a binding apportionment.

[JESSEL, M.R.:—How do you escape from the limitation of six months held applicable in *Tottenham Local Board of Health* v. *Rowell* (1)?]

By 21 & 22 Vict. c. 98, s. 62, the time does not begin to run till demand. No demand was made till the 12th of February, 1878, and within six months from that time we commenced proceedings in the Queen's Bench Division.

[JESSEL, M.R.:—Could you do so? The *Public Health Act* created a liability previously unknown to the law, and gave a remedy for enforcing it by an application to magistrates. Have you any other remedy?]

By the 21 & 22 Vict. c. 98, s. 62, the expenses are made a charge on the property, so they must be recoverable out of the property which forms a part of the testator's estate, and we therefore must be creditors.

Sir *H. Jackson*, Q.C., and *F. T. White*, for the Plaintiff; *Lambert*, for the tenant for life; and *Hemming*, Q.C., and *B. B. Swan*, for *Edmunds*, were not called upon.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon* refusing leave to the Appellants to prove as creditors of the testator in the cause.

The first question raised is whether the Vice-Chancellor was right in saying that the Appellants were not creditors of the testator and had no right against his estate. It is not necessary to decide this question. I think that they were not creditors, and that under the first Act the testator was not liable to anything; but I am satisfied that as they made a demand in February, 1878, and let six months elapse without taking any proceedings before

(1) 1 Ex. D. 514.

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justices of the peace, their claim, if any, under that Act is barred. For sums above £20 proceedings are to be taken before justices, and it is a settled rule that if a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy. The claim to prove must therefore fail.

The second point is this: sect. 62 of the *Local Government Act* of 1858, as it appears to me, though I do not give a final opinion upon it, makes the person who at the time of completion of the works is the owner of the property in respect of which the expenses have been incurred liable for the expenses, and they are made a charge on the property. We are not now dealing with the owner at the time of the completion of the work, but it is said that the testator's estate consists in part of the property thus made liable, and that payment out of it ought therefore to be ordered. But a charge on property cannot be enforced by a summons in an administration suit, it can only be enforced by action. Sometimes by consent it is done on summons, and this is often found very convenient, but the Legislature has not given power to try such matters on summons without consent. We ought not to depart from the procedure prescribed by the *Judicature Act*, and allow matters of this nature to be dealt with adversely on summons. The appeal must be dismissed without prejudice to any action which may be commenced by the Appellants.

BRETT, L.J.:—

I am of opinion that the relation of debtor and creditor never can arise under these Acts between a board and an owner of property for expenses incurred by the board. The first statute creates a liability previously unknown to the law, and gives a mode of enforcing it. Under these circumstances the only remedy is the remedy given by the Act. Under the first statute the remedy given is to enforce payment by summary proceedings before justices of the peace, and this does not create the relation of debtor and creditor. By *Jervis's Act* such proceedings must be taken within six months. This has not been done, and the Appellants therefore, so far as the matter depends on the first statute, have no remedy at all.

Then, as regards the second statute, the 62nd section never applied to the testator, for he was not the owner of the property when the work was completed. But supposing he had been so, the only remedy, except the charge on the property, is the same remedy as before, and there is no personal liability imposed on the testator except the liability to proceedings before justices. The application of the Appellants, therefore, to prove as creditors cannot be supported. As to whether a charge for these expenses can by any process be enforced against this particular property, I give no opinion, as nothing that we now decide will prejudice any proceedings that may be taken to enforce such a charge.

COTTON, L.J.:—

I also am of opinion that the decision of the Vice-Chancellor is right. The Act of 1848 gave to a public body power to make improvements which would be a benefit to the owners of the adjoining properties, to call upon those owners to do the works, and in case of their default to do the works themselves and recover the expenses from the adjoining owners by summary proceedings before justices. That enactment does not create any debt, but gives the public body a right to proceed in a particular way against the owner to recover the amount. There was therefore no debt due from the testator, even if he was the person against whom summary proceedings to recover the amount ought to have been taken. But I doubt whether he came within this provision at all, for he was dead when the works were actually done. My opinion that this was not a debt is strengthened by the *Local Government Amendment Act*, 1861, s. 24, which gives power to sue in the County Court where the amount is under £20. If the previous Act had made the claim a debt and only given an additional remedy by summary proceedings before justices, this enactment would have been unnecessary, for the sum would already have been recoverable in a County Court. As to the alleged charge on the property, the question is whether it can be dealt with on this summons, and I am of opinion that it cannot. It would not be right for us to give any opinion whether there is a charge which can be enforced in some other way. All we can now

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say is that a charge upon part of a testator's estate cannot be enforced by taking out a summons to prove a debt in a suit for the administration of his estate.

Solicitors for the Board: *Nicol, Son, & Jones*, agents for *Grece, Redhill.*

Solicitors for Plaintiffs: *Letts Brothers.*

Solicitor for Tenant for Life: *J. H. Scott.*

Solicitor for Defendant *Edmunds*: *G. R. Edmunds.*

C. A. 1880 Feb. 19.

Ex parte CORBETT. *In re* SHAND.

Proof in Bankruptcy—Partners—Joint and Separate Estate—Lease of Partnership Premises to Partners as Joint Tenants—Joint and Several Covenant to pay Rent—Disclaimer of Lease by Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 37.

When the trustee in bankruptcy of partners disclaims a lease of premises used by the partners for partnership purposes, but which was granted to the partners as joint tenants, they entering into a joint and several covenant to pay the rent, sect. 23 of the *Bankruptcy Act*, 1869, gives the lessor a right to prove against the separate estate of each partner for the injury caused to him by the disclaimer.

Whether a right is given to prove also against the joint estate of the partners, *quære.*

Per Cotton, L.J.: Sect. 37 applies only to proofs arising out of contracts; it does not apply to proofs made in pursuance of sect. 23.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 24th of September, 1864, *C. J. Corbett* granted to *Francis Shand*, *Charles Shand*, *Alexander Shand*, and *R. A. Robinson*, who were then carrying on business in partnership as merchants, a lease of six rooms in the house No. 23, *Rood Lane*, in the city of *London*, for a term of $13\frac{3}{4}$ years, less twelve days, from the 24th of June, 1864, at an annual rent of £415. The lease contained a covenant by the lessees, jointly and severally, to pay the rent and repair the premises. The rooms were occupied for the purpose of the partnership business, and the lease was as between the partners partnership property. *Francis Shand* died, and the business was thenceforth

carried on in partnership by the other three lessees in the same rooms, until, on the 12th of August, 1875, they were adjudicated bankrupts. On the 30th of August, 1875, a trustee of their property was appointed, and he, on the 6th of October, 1875, obtained leave from the Court to disclaim the lease. He afterwards executed a disclaimer, and possession of the rooms was given up to and accepted by the lessor. The lessor afterwards relet the rooms, but at a lower rent. On the 14th of May, 1879, he tendered a proof against the joint estate of the bankrupts, and also against their separate estates, for £396 2*s.* 6*d.* This sum was made up of £346 2*s.* 6*d.*, the difference between the amount of the rent which would, if there had been no disclaimer, have been payable under the lease from the 29th of September, 1875, to the expiration of the term, and the amount of the rent which had been actually received under the reletting during the same period, and £50 for dilapidations to the rooms.

The Registrar ordered the proof to be admitted against the joint estate only. The lessor appealed.

Higgins, Q.C., and *H. A. Giffard*, for the Appellant:—

By the disclaimer the Appellant is deprived of the right to sue on the joint and several covenant to pay the rent. He is therefore, under sect. 37 of the Act, entitled to prove against the joint and the separate estates. In *Ex parte Honey* (1) Lord Justice *Mellish* said (2): "It was the intention of the Legislature that, wherever there was a joint and separate contract, and joint and separate estates being administered in bankruptcy, the creditor should be entitled to prove against both the joint and separate estates." If, however, the Court should hold that the Appellant must elect to prove either against the joint estate or against the separate estates, he would elect to prove against the separate estates.

[JAMES, L.J.:—There is no joint estate of the four joint contractors.]

It has survived to the three survivors.

Sect. 23 does not affect the question what estates the Appellant

(1) Law Rep. 7 Ch. 178. (2) Law Rep. 7 Ch. 183.

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is entitled to prove against. *Ex parte Stone* (1) shews that sect. 37 is not confined to contracts entered into by a firm of partners *eo nomine*. The disclaimer is in effect an admission that the lease was part of the joint assets of the partnership. If the lease had been a beneficial one, could the three survivors have taken the benefit of it, and at the same time have escaped liability on the covenants? If the lease had run out, surely the Appellant would have been entitled to prove for a breach of the covenant against the joint estate as well as the separate estates. Why should the disclaimer make any difference? It is a disclaimer of some joint estate. Sect. 31 gives the right to prove for all "liabilities" to which the bankrupt is subject at the date of the adjudication, and gives a very wide definition of the word "liability." The injury which the lessor has suffered in the present case by the operation of sect. 23 is the diminution of his rent for the remainder of the term.

Ex parte Blake (2) shews what is the measure of damages.

J. Pearson, Q.C., and *Finlay Knight*, for the trustee:—

The question is as to the effect of sect. 23; the right to prove is a purely statutory one. In covenanting separately for payment of the rent, each of the partners was contracting as a surety for the firm. There is no right of proof as against the sureties. If the lease had been actually surrendered the covenants would have been gone as against the sureties as from the date of the surrender, and by sect. 23 the disclaimer is to have the effect of a surrender at the date of the adjudication. The claim is not made under the covenants, and the lessor has accepted the surrender.

[JAMES, L.J.:—He could not help doing so.]

The lease is gone altogether as against the parties to it, and no one could be sued on the covenants. The right of proof can only be against the bankrupt whose trustee has disclaimed.

[JAMES, L.J.:—The trustee is trustee of the separate estates as well as of the joint estate.]

The proof must be against the estate which is benefited by the disclaimer, against the estate to which the disclaimed lease

(1) Law Rep. 8 Ch. 914. (2) 11 Ch. D. 572.

belonged. Here the lease formed part of the joint estate. There cannot be a double proof, for sect. 37 does not apply. And the judgment of Baron *Bramwell* in *Smyth* v. *North* (1) shews that after a disclaimer by a trustee in bankruptcy a surety could not be sued on the covenant to pay rent. The separate estates are in the position of sureties for the joint estate. When partners file a liquidation petition, if the joint estate is administered by means of a liquidation by arrangement, the separate creditors may resolve to accept a composition: Bankruptcy Rules, 1870, r. 285.

[COTTON, L.J.:—I feel this difficulty with regard to sect. 23, whether the right of proof is not given against the estate of the bankrupt in whose trustee the disclaimed property would have vested but for the disclaimer.]

Gifford, in reply:—

The words of sect. 23 are general: "Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy." But for the disclaimer the lease would have vested in the trustee of the estates of the bankrupts. Any relief which, by virtue of the disclaimer, the joint estate obtains from any liability under the lease, will operate *pro tanto* to increase the surplus coming from the joint estate to the separate estates. The benefit resulting from the disclaimer is vested in the trustee for whichever estate may be ultimately entitled to it. The object of the disclaimer was to relieve the bankrupts from liability severally and collectively, and the proof ought to be against those estates which get the benefit. If the separate estates are exonerated from the covenants in the lease, it is only by virtue of the disclaimer. In *Smyth* v. *North* the decision was that the disclaimer did not operate to put an end to the lease for all purposes, but only as against the bankrupt. In the present case none of the bankrupts can now be sued on the covenant, but there is a correlative right of proof given by sect. 23 against the estate of each of them. Indeed, the joint and several covenant of the lessees is an "unprofitable contract" within the meaning of sect. 23.

(1) Law Rep. 7 Ex. 242, 245.

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JAMES, L.J.:—

This 23rd section is really one of great difficulty, as are all the sections of the Act which deal with the peculiar powers given to trustees in bankruptcy to interfere with the rights of lessors and other persons. But I think we can see our way to decide in accordance with the justice and common sense of the matter.

Of course we start with this fact, that the trustee wants to get rid of the lease, that it is a *damnosa hæreditas*, and, therefore, it never could have been for any practical purpose any part of either joint or separate estate. It was, in truth, nothing but a liability, but, under the operation of this section, the trustee disclaims the liability so as to put an end to the lease as between the lessor and the lessees.

Now, independently of the bankruptcy law, whose lease was it that he was disclaiming? It was not the lease of the firm, because there is no such thing as a firm known to the law. The firm, as *cestuis que trustent*, might have been the beneficial owners of the lease, but the legal estate in the lease was vested in three joint tenants, *A.*, *B.*, and *C.*, who happened to be in business together, and unfortunately happened to become bankrupt. The trustee, who is the trustee of the joint estate as well as of the separate estates, is the trustee of the property of *A.*, *B.*, and *C.*, and he is authorized, although he may have done some act which under the old law would have bound him to elect to take the lease, to disclaim it. He is authorized to release the bankrupts from all the liability under which they would have been if the lease had not been surrendered. Then he, under that statutory power, surrenders the lease against the will of the lessor, and the lessor is obliged to accept the surrender. For whom is he surrendering it? He is surrendering it for the three joint tenants whose lease it was; he is surrendering it for them and for each of them. Each of them was possessed of the lease *per my et per tout.* That being so, the Legislature has said, You may on behalf of those persons surrender the lease entirely, and put an end to it as between the lessor and the lessee. The lessor has certain remedies against his lessees. But the Legislature says to him, instead of those remedies, you may prove against the estate of the bankrupt. Of course the word "bankrupt" may mean plural or singular, or

plural and singular, according to the context. But sect. 23 says, You may have a right of proof against an estate for the damage you have sustained. It is not very much we give you, but we do give you a right of proof for the amount of the damage you have sustained. Against whom is he to prove? He is to prove against the bankrupt whose trustee has disclaimed. It seems to me that in this particular case no question of joint and separate estate can arise, because there is no joint estate of the joint contractors so as to bring in the 37th section. There were four persons who covenanted jointly, and there is no joint estate of those four. How the case would have stood if the three bankrupts had entered into the joint covenant it is not necessary for me to say. But here there is a distinct liability of each of the three bankrupts on their covenant, and that liability has been put an end to by the act of the trustee. The act of the trustee has enured to the injury of the lessor. The lessor has a right of proof. Against whom? It seems to me it must be against the estates of the persons upon whose behalf and for whose benefit the lessor has been made to endure this injury, that is to say, he is entitled to prove against the separate estate of each of those three persons. That, as it appears to me, would have been the proper order for the Registrar to make, and no proof ought to have been admitted against the joint estate. Of course, Mr. *Giffard,* you will elect?

Giffard:—Of course, if your Lordship says I am bound to elect, I will make my election now, but the Registrar's order deprived me of that right.

BRETT, L.J.:—

As it seems to me, there is no occasion to give any opinion upon the 37th section, and in this case the whole matter depends on the 23rd section. In my view of the matter it is not absolutely material to decide whether there could have been any right to prove against the joint estate, because I am of opinion that, at all events, there is in the present case a right to prove against the separate estates. There are several bankrupt estates. The joint estate is bankrupt, and each of the separate estates is bankrupt. There is one trustee in respect of all those estates. He is trustee

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of all and of each of them. He might by virtue of the statute, if he had chosen to keep it, have acquired this lease, and, if so, he would have acquired it as property coming to him as trustee. Therefore, that lease being in such a condition that it may become his property, if he chooses to take to it, he can only take to it as trustee in the bankruptcy; in other words, it comes to him by virtue of the bankruptcy and by virtue of the statute. But he may by writing under his hand disclaim the lease, and he does so. He disclaims the lease. Thereupon the lease is, for all purposes, other than the remedy given by sect. 23, to be deemed to have been surrendered as at the date of the order of adjudication. But it is not a surrender accepted by the lessor; it is a surrender made in spite of the will of the lessor, and however much he might have desired to insist upon the continuance of the lease. Then by the act of the trustee, which act he is entitled to do by virtue of the *Bankruptcy Act*, and of that alone, the trustee injures the lessor, he being the trustee of each and every one of the bankrupt estates. How has he injured the lessor? I will assume for the moment that the covenants in the lease were binding upon the three bankrupts jointly, but they were also binding upon each of them separately. Then by this surrender, unless some remedy is given by this section, the lessor would lose any claim he had against the three jointly, but he would equally lose any claim he had against each of the three separately. By the act of the trustee the lessor against his will is injured in respect of his claims against all the bankrupts and against each of them. Then, that being so, the latter part of the section deals with the injury which has been suffered by the lessor; it is a provision in favour of the lessor, the person injured. It says: "Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy." Undoubtedly, as it seems to me, whatever view you take of it, the lessor is a person who has been injured "by the operation of the section." It is only by the operation of the section that he is injured, and, that being so, the section says "he shall be deemed a creditor of the bankrupt to the extent of such injury." Now what is the extent of his injury? His injury is, first of all, the loss of any claim that he may have had

on the joint estate. But that is not the whole extent of his injury. He is injured also with respect to his claim against each of the separate estates. The section says "he may accordingly prove the same as a debt under the bankruptcy," that is, under the bankruptcy in which the trustee is trustee, and he is trustee in the joint bankruptcy and also in each separate bankruptcy. It seems to me that the case with regard to the separate estates is within the very words, and it is certainly within the spirit of the latter part of the section.

I think also that there is a general rule of construction of statutes which is applicable to this matter, namely, that, unless you are obliged to do so, you must not suppose that the Legislature intended to do a palpable injustice, and it seems to me that in a case where the claim is for an injury done to a person against his will, it would be a palpable injustice to deprive the lessor of a remedy against the separate estates, just as much as it would be to deprive him of a remedy against the joint estate. I am, therefore, of opinion that there is a right to prove against the separate estates.

COTTON, L.J.:—

In this case a proof has been admitted against the joint estate of the bankrupts, and the question is whether it ought to be admitted against the separate estates or against the joint estate.

It was contended that it should be admitted against both joint and separate estates, and sect. 37 was relied upon for that purpose. In my opinion sect. 37 is inapplicable. That section, whatever might be the result under such a covenant, in my opinion only applies to proofs under contracts. What we have now to deal with is a proof, not under a contract entered into by any of the persons who have become bankrupt or by all of them, but under the right given in the latter part of sect. 23, which says, "Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy." That section is the only part of the *Bankruptcy Act* with which, in my opinion, we have to deal.

First of all, I will consider what is the construction which is

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to be put upon this section. It certainly gives rise to great difficulty, because it requires us to deal with things which do not exist as if they did exist. Now, the right of proof is given to the person who is injured by these words, "shall be deemed a creditor." It does not proceed upon any claim that he had as a creditor, but it says that he shall be deemed to be a creditor to the extent of the injury he has suffered, and the question is whether the Appellant had any claim against the joint or the separate estates independently of the operation of this section. In my opinion that does not determine as against whom the right to prove is given. The person injured is to be "deemed to be a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy." It appears to me that the lessor's injury consists in his being deprived of the lease, and of certain consequences accruing by the existence of the lease. That is the extent of the injury, but how he is to prove, and against what he is to prove, must depend upon the correct meaning of this part of the section. Now I think we must look to the earlier part of the section. Power is given to the trustee in the bankruptcy to disclaim, and the effect of that is to be that the lease is to be deemed to have been surrendered as at the date of the adjudication. I think that the fair construction of the section, before we come to the particular circumstances, is this, that when a trustee has vested in him, as trustee of a bankrupt, or as trustee of bankrupts, a lease, then, they being the persons who could have surrendered if there had been no bankruptcy, the trustee of the person or persons in whom the lease is vested is the person who has the power given to him of disclaiming, and whose act of disclaimer binds the Court to deal with the matter as if in fact there had been a surrender of the lease.

Apply that to the present case. Here there are three persons who are bankrupts, and the trustee was appointed trustee of their estates. At the time of the bankruptcy a lease was vested in those three persons as joint tenants. The trustee in fact never had the lease at all, though it would have vested in him if he had accepted it. But it would have vested in him as the trustee of those three persons, and as the trustee of those three persons he has the power under sect. 23 of disclaiming the lease, and the disclaimer is to have the same effect as if there had been

a surrender of the lease at the date of the adjudication. That being so, I think we may fairly construe the latter part of the section as giving a right of proof against the estates of those three persons in whom the lease was vested, and whose trustee has in fact exercised the power of disclaiming which gives the right of proof. It is true that a difficulty is caused by the first part of the section, which commences in this way: "When any property of the bankrupt acquired by the trustee under this Act," and so on. That would seem to point to property acquired by the trustee for the purpose of distribution amongst the creditors of the bankrupt, who in this particular case would no doubt be the joint creditors. But then the whole of the introductory part of the section is almost unintelligible, because the very hypothesis of the section is that the trustee never does acquire the property. I take it, therefore, that it really means this, that when there is a right or property of a bankrupt which, but for that section, would have become vested in his trustee on certain onerous terms, on behalf of the person in whom that property is vested, the trustee may disclaim, and then the right of proof by the injured person is to arise. And in respect of a joint and several covenant on which bankrupts were liable, the right of proof would arise against the estates of those persons as trustee for whom the trustee would have taken the property, if he had chosen to accept it. It is true that, if he had done so, he would have had to dispose of the property for the purposes of the joint estate, but really he is not the trustee of the firm, but he is the trustee of the individuals. The trustee is the trustee of the property of the three bankrupts. Separate accounts have to be kept for the purpose of ascertaining how the property is to be distributed, in payment either of the joint or of the separate creditors. Although I agree that this section is a very difficult one to construe, and though I have had much doubt about it, I think the reasonable construction is that the right of proof is given against the estates of those persons in whom the lease was vested, and whose trustee disclaims. That, I think, is the true construction.

JAMES, L.J.:—

I forgot to say that I think the construction may be aided by

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this consideration, that it is a very common thing indeed, when leasehold property is acquired solely for the purposes of a firm, for the lease to be taken in the name of the senior partner in the firm. Beyond all question, in such a case there would be a right of proof against the senior partner's estate.

Solicitors for Appellants: *Jenkinson & Olivers.*
Solicitors for Trustee: *Harries, Wilkinson, & Raikes.*

C. A. 1879 C. J. B. *Nov.* 17. C. A. 1880 *Feb.* 19.

Ex parte HALL. *In re* TOWNSEND.

Execution—Delivery of Writ to Sheriff—Sale by Sheriff before Seizure—Bankruptcy—Secured Creditor—Payment of Execution Debt by Third Party—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16.

The sheriff cannot make a valid contract for sale of the goods of a judgment debtor against whom he holds a writ of *fi. fa.* until he has actually seized the goods.

After a writ of *fi. fa.* had been issued against a non-trader and lodged with the sheriff, but before any levy had been made, an arrangement (which the Court held to be fraudulent) was, with the knowledge of the under-sheriff, made between the debtor and *H.*, an auctioneer, that *H.* should, after a levy had been made, purchase goods of the debtor sufficient to satisfy the amount to be levied, and that he and the debtor should at once select the goods which *H.* was to purchase. *H.* knew that the debtor was about to file a liquidation petition. On the 19th of March the goods were selected, and were pointed out to *B.*, a clerk of the under-sheriff, who took a list of them, which he handed to the under-sheriff. On the 20th of March *B.* seized the goods and put a man in possession. Shortly afterwards the debtor filed a liquidation petition, but, before notice of the petition had been served on the under-sheriff, he had sent to *H.*, telling him that the seizure had been made, and that the selected goods were his property, and asking him to send a cheque for the amount of the levy. Later in the same day the under-sheriff gave up possession of the goods to a receiver who had been appointed under the petition, under the mistaken impression that the debtor was a trader. The next day *H.* sent a cheque for the amount of the levy to the under-sheriff, and out of the proceeds the execution debt was paid. A trustee having been appointed under the petition, *H.* applied to the Court for an order that the trustee should deliver up the selected goods to him, or pay him the amount which they had produced. The trustee had sold them for double what *H.* had paid:—

Held, that the goods had never become the property of *H.*, and that, although, by virtue of the seizure before the filing of the petition, the execution creditor had acquired a security for his debt on the debtor's property,

yet *H.*, who had chosen to enter into a fraudulent arrangement with the debtor with knowledge that he was about to commit an act of bankruptcy, had no equity to be allowed to stand in the place of the execution creditor, notwithstanding the fact that, by paying the execution debt, he had relieved the debtor's estate from the necessity of paying it.

Decision of *Bacon*, C.J., affirmed.

ON the 19th of March, 1879, a writ of *fi. fa.* had been issued by a judgment creditor named *Bann* against *T. C. Townsend*, a civil engineer, and was in the hands of the sheriff of *Shropshire* for execution. The amount to be levied was £80 7*s.* 11*d.* On the same day an arrangement was made between *William Hall*, an auctioneer, and *Townsend*, with the knowledge of the under-sheriff, that *Hall* should, on the seizure being made by the sheriff, become the purchaser of some of the debtor's goods sufficient to satisfy the levy, and that *Hall* should previously go with the debtor to his house, and with him select the goods which he was to purchase. The under-sheriff agreed to postpone the levy until 1 P.M. of the 20th of March, and *Townsend* promised not to commit an act of bankruptcy before that time. Accordingly, on the afternoon of the 19th of March, *Hall* and *Townsend*, and one *Barnaby*, a clerk of the under-sheriff, to whom the warrant to levy was directed, went to *Townsend's* house. The goods were selected, and were then pointed out to *Barnaby*, who took a list of them, which he gave to the under-sheriff the same evening.

On the morning of the 20th of March the under-sheriff received instructions from *Bann* to make the seizure at once, and he accordingly, about eleven o'clock, directed *Barnaby* to go to *Townsend's* house at once to make the levy. Shortly before 1 P.M. the same day, *Townsend* filed a liquidation petition in the *Shrewsbury* County Court. A receiver was appointed and an injunction granted, restraining any further proceedings under *Bann's* judgment. Notice of this order was served on the under-sheriff about 1 P.M. Meanwhile, the seizure of the debtor's goods had been effected by *Barnaby* before the petition was filed, and a man had been left in possession, and before the notice of the injunction was served on the under-sheriff, he had sent to *Hall* informing him that the seizure had been made, and that the selected goods were his property, and requesting him to send a cheque for the £80 7*s.* 11*d.* *Hall* was away from home that day, and did not return till the

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evening. He afterwards sent a cheque for the £80 7*s.* 11*d.* to the under-sheriff, but it was not received before the 21st of March, though it did not appear exactly when. When the notice of the injunction was served on the under-sheriff, he, being under the impression that the debtor was a trader, agreed to withdraw the man who was in possession on receiving a guarantie for the sheriff's costs from the solicitors who were acting for the debtor in the matter of the petition. This guarantie was given, and on the evening of the 20th of March the man was withdrawn.

On the 27th of March *Hall* took forcible possession of the selected goods, and removed them out of the possession of the receiver, but he was afterwards compelled by an order of the County Court to restore them. The selected goods were subsequently sold by the trustee in the liquidation for £177. Out of the proceeds of *Hall's* cheque the under-sheriff paid *Bann* his debt.

Hall applied to the County Court for an order that the goods which he had purchased should be delivered up to him, or the produce thereof paid to him by the trustee. The application was refused by the Judge, on the ground that there had been no seizure and sale of the goods, and that they were not the property of *Hall*. *Hall* appealed to the Chief Judge. The appeal was heard on the 17th of November, 1879.

Finlay Knight, for the Appellant, referred to *Ex parte Williams* (1); *Gladstone* v. *Padwick* (2).

De Gex, Q.C., and *E. Cooper Willis*, for the trustee, urged that the sale to *Hall* was a mere sham.

Finlay Knight, in reply.

BACON, C.J.:—

I think that the learned Judge has come to a right conclusion. The facts are these: The sheriff, having in his hands a writ, which it was his duty to execute, postponed the performance of that duty in consequence of an arrangement which was come to with the debtor. That is the sort of possession which the sheriff

(1) Law Rep. 7 Ch. 314. (2) Law Rep. 6 Ex. 203.

took; it was a possession which he undertook not to make active until one o'clock on the following day. In the meantime Mr. *Hall*, who I suppose was a friend of the debtor, under some terms of arrangement with him, goes over with the sheriff's clerk and selects out of the debtor's goods certain articles which are the subject of the present application. Whether they were the best or not, I do not know. But he selects certain articles, and says, I will become the purchaser of them if the execution should be made active. It never was made active. He says he paid for the goods, but he omits to state precisely when he paid for them, knowing very well that there had been a stay of all proceedings on the execution at one o'clock on the 20th of March, within the time to which the sheriff had undertaken to postpone the execution of the writ.

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It is impossible that such a transaction can be held valid. If the goods had been worth only the £80 which was given for them, it would have made no difference, but it does not improve the complexion of the case when I find that this auctioneer, this appraiser, this valuer, under the circumstances I have mentioned, makes out a list of certain articles of which he was willing to become the purchaser at his own price, namely, half their true value. The act of bankruptcy happened before anything had been done which could vest any right in Mr. *Hall*. What the right of the execution creditor against the sheriff may be I have not inquired into; they are not here, nor have I any right to suppose there is any dispute between them. As to Mr. *Hall*, it is impossible to suppose that by making out a list of certain goods in the hands of the sheriff he could become a purchaser of them, there being no precise evidence as to the time at which the payment was made. In my opinion the claim fails altogether, and the appeal must be dismissed.

From this decision *Hall* appealed. The appeal was heard on the 19th of February, 1880. C. A.

Finlay Knight, for the Appellant:—

The Appellant bought and paid for the goods, and is entitled to have them. There is no evidence of any fraud or collusion. If

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the sheriff sold the goods improperly at an under-value, he is liable for damages. By the seizure under the writ the sheriff acquires a special property in the goods: *Ex parte Williams* (1). The sheriff is not bound to sell by public auction; he may even sell to the execution creditor: *Ex parte Villars* (2). Very little is sufficient to constitute a seizure: *Gladstone* v. *Padwick* (3). If no valid contract for sale was made before the seizure on the 20th of March, the actual payment for the goods by *Hall* constituted a valid sale.

[COTTON, L.J.:—*Hall's* cheque appears to have been received after the sheriff's man had withdrawn from possession.]

At any rate, the seizure on the 20th of March took place before the petition was filed, and by it the execution creditor became a secured creditor: *Slater* v. *Pinder* (4). *Hall* has paid the execution debt, and has thus relieved the debtor's estate from the obligation of paying it in full. He is therefore entitled to stand in the place of the execution creditor, and to receive out of the proceeds of the sale of the goods the amount of the levy.

De Gex, Q.C., and *E. Cooper Willis*, for the trustee, were not heard.

JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge must be affirmed. There never was any real sale of the goods to *Hall*, or anything amounting to a sale. There was some private arrangement between *Hall* and the debtor; *Hall* was to select the goods and to fix their value. It was done on the debtor's responsibility, and the sheriff had nothing to do with the sale. He never valued the goods, or pretended that he was selling any particular goods, but he left *Townsend* and *Hall* to agree what should be the subject of the sale. It was a mere sham sale, and it is perfectly clear that no property in the goods ever vested in *Hall*, and therefore he was not entitled to that which he asked, viz., that the goods should be returned to him. It has, however, crossed our minds whether we could give any relief to *Hall* under

(1) Law Rep. 7 Ch. 314.
(2) Ibid. 9 Ch. 432.
(3) Law Rep. 6 Ex. 203.
(4) Law Rep. 6 Ex. 228; Ibid. 7 Ex. 95.

these circumstances. There was apparently an actual seizure by the sheriff before the act of bankruptcy, so that the judgment creditor would have been entitled to be paid in full, and somehow or other Mr. *Hall's* money has gone to pay the judgment creditor, and the trustee has got the goods. But we do not see our way to work out any equity on behalf of a man who has chosen to act in such a way. He has got himself into the difficulty, and we cannot help him out of it.

BRETT, L.J.:—

There is no doubt that on the 19th of March, 1879, *Townsend* was insolvent and knew it; he knew that he would have to file a petition, and that being the state of things on the 19th, the sheriff, *Townsend*, and *Hall* go to the place, the sheriff having a writ of *fi. fa.* in his hands. The sheriff stands by and does not seize, but he allows *Townsend* and *Hall* to come to an arrangement. *Townsend* selects goods, which on a fair sale would fetch £177, to be sold, or apparently to be sold, to satisfy an execution for £84. Can any one believe that, if there had been no insolvency or bankruptcy coming on, an execution debtor would of his own accord select goods of the value of £177 to satisfy his execution creditor for £84? It is absurd. Therefore it is palpable to my mind that *Hall* and *Townsend*, whilst the sheriff was standing by looking on, were coming to an arrangement which was to take out of the coming bankruptcy goods of the value of £177 for the benefit of *Townsend*, *Hall* paying for them only the £84 which would satisfy the execution. *Townsend* would be the gainer of the difference, that is, he would have the difference after the bankruptcy. That, to my mind, was a fraud. At that time there was no contract made by the sheriff with *Hall;* he could not make a contract. In order to make a contract there must be the intention of both parties that there should be a contract, and it is absurd to suppose that either the sheriff or *Hall* intended to be bound by that arrangement. There was only a fraudulent arrangement between *Townsend* and *Hall*, and no contract at all with the sheriff then. No doubt the next day there was the seizure, and after the seizure *Hall* sent a cheque which was accepted by the sheriff, and which was paid over to the execution creditor. But that was a payment by *Hall* in

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order to carry out the fraudulent arrangement which he had previously made with *Townsend*. There being no contract of sale, there was nothing which ever passed the property in the goods to *Hall*. The goods, therefore, as it seems to me, belonged to the trustee, and he has a right to the whole of them.

But then it was suggested, and for a time the suggestion impressed me, that it would be hard on *Hall* that the trustee should get the goods for nothing, although they might have been sold to satisfy the execution debt of £84, and that therefore *Hall*, who has paid the £84 to the execution creditor, ought to have it repaid to him by the trustee. But the state of things is this, that, by the failure of *Townsend* and *Hall* to carry out their fraudulent scheme, the trustee has got the goods, and why should the trustee pay to *Hall* that money which he has been foolish enough to pay in assisting to carry out a fraud? There is neither law nor equity in that. The trustee is therefore entitled to the goods without payment, and *Hall* must lose his £84 by reason of his having paid it in an attempt to commit a fraud.

COTTON, L.J.:—

I also am of opinion that the decision of the Chief Judge must be affirmed. At the time of the filing of the petition the sheriff had seized the goods, but very shortly afterwards he retired from possession under the supposition that the bankrupt was a trader, and the trustee got possession of them. That being so, how does the Appellant make out his title? He says that there had been a previous sale by the sheriff to him, and of course, if he is to maintain that point, he must make out, not only that there was a formal sale, but that there was a *bonâ fide* sale free from anything in the nature of fraud, a real sale by the sheriff to him. The sheriff, having had the writ for some days, had not seized on the 19th of March, and what took place on that day was relied on as a contract of sale by the sheriff. But it is evident that it did not even purport to be that. It was an arrangement between the debtor and *Hall* that they together should select the goods and make an arrangement as to something which was to be afterwards done when the sheriff had seized. The under-sheriff appears to have expressly said, "I do not take upon

myself any responsibility as to the value of the goods. You, the debtor, and you *Hall*, the proposed purchaser, must take the responsibility of selecting a proper amount of goods to satisfy the debt." How they did that we know, because the goods selected were sold afterwards for double the amount of the execution. There was no contract with the sheriff, and, if there had been, the sheriff could not sell the goods before he had seized them. The sheriff afterwards seized the goods. There was really no *bonâ fide* sale by him; all he was doing was formal and, as he supposed, to give effect to the contract entered into between the debtor and *Hall*. That was not sufficient to pass the property in the goods to *Hall*, the supposed purchaser under the arrangement with *Townsend*.

But then we must consider whether, as there had been a seizure before the petition, and the execution creditor has been paid, apparently by *Hall's* money, we ought to direct that money to be repaid to *Hall*. We have not heard Mr. *De Gex*, so that we do not know quite how the facts stand. It was the money of *Hall* which paid the execution creditor, but I cannot look upon the payment as a *bonâ fide* one, because it appears that on the 19th of March, when the arrangement was made between *Townsend* and *Hall*, there was something like a promise by the debtor that he would not commit an act of bankruptcy before one o'clock the next day, in order to enable the sale of these goods for half their value to be carried into effect. If a man chooses to enter into a transaction of this kind with a person whom he knows to be in difficulties, and to be probably about to commit an act of bankruptcy, he must take the consequences. I am of opinion, therefore, that the appeal must be dismissed.

Solicitors for Appellant: *Paterson, Snow, & Bloxam*, agents for *C. Chandler, Shrewsbury*.

Solicitors for Trustee: *Clarke, Woodcock, & Ryland*, agents for *Clarke & Sons, Shrewsbury*.

M. R. 1879 May 22; Nov. 24.

FOURTH CITY MUTUAL BENEFIT BUILDING SOCIETY *v.* WILLIAMS.

[1878 F. 127.]

MARSON *v.* COX.

[1878 M. 122.]

1878 D572

32 & 37 Vict. c. 42

Building Society—Mortgage—Statutory Receipt—Successive Incumbrancers—Priority—Right to call for Legal Estate—"Owner of Equity of Redemption"—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 42.

When the legal estate in land has been vested in a building society as mortgagees, and the society, on being paid off, indorses a receipt on the mortgage deed, as provided by sect. 42 of the *Building Societies Act*, 1874, the effect of the receipt is to vest the legal estate in the person who in equity is best entitled to call for it, and not necessarily in the person who actually paid off the society. Thus, where there are successive equitable mortgagees, and the society is paid off by the mortgagor, the effect of the statutory receipt is to vest the legal estate in the equitable mortgagee who is first in point of time; unless the society is paid off by an equitable mortgagee who had no notice of prior incumbrances, in which case the legal estate vests in that mortgagee, notwithstanding that there are incumbrances prior to his in point of date.

Pease v. *Jackson* (1) considered.

FIRST ACTION.

BY an indenture dated the 9th of November, 1872, certain land at *Dulwich*, known as the "*Summerfield* property," was conveyed by the *British Land Company, Limited*, to *Edward Downs* in fee simple. On the same day *Downs* mortgaged this property by deed to the trustees of the *Liberator Permanent Benefit Building Society*.

On the 7th of December, 1875, *Downs* mortgaged the same property by deed to one *Colman*. This mortgage deed contained no reference to the mortgage to the *Liberator Society*, but shortly afterwards *Downs* paid off the society's mortgage out of the money advanced to him by *Colman*, and what purported to be a statutory receipt under the seal of the society (which had then become incorporated under the *Building Societies Act*, 1874), dated the 30th of December, 1875, was indorsed on the mortgage of the 9th of

(1) Law Rep. 3 Ch. 576.

November, 1872. *Colman* was not a party or in any way privy to this transaction; and the *Liberator Society's* mortgage deed remained for some time afterwards in *Downs'* possession. On the 29th of January, 1876, *Downs* mortgaged the *Summerfield* property to the *Fourth City Mutual Benefit Building Society*, who had been duly incorporated under the said Act. That society had then no notice of any other incumbrance affecting the property. *Downs* at the same time handed over to the *Fourth City Society* a document purporting to be the conveyance to him by the *British Land Company*, but this document was afterwards discovered to have been a forgery by *Downs*.

On the 9th of February, 1876, *Downs* executed to *Colman* a further charge on the *Summerfield* property. On the 4th of August, 1876, *Downs* paid off *Colman's* mortgage and further charge, and took a reconveyance of the *Summerfield* property.

On the 20th of November, 1876, *Downs* executed a further charge on the *Summerfield* property to the *Fourth City Society*, they having no notice of any incumbrance thereon other than their mortgage of the 29th of January, 1876.

On the 2nd of February, 1877, *Downs* mortgaged the *Summerfield* property to one *Glyn*, who, on the 13th of August, 1877, transferred his mortgage to two persons named *J. Williams* and *Bowerman*. Neither *Glyn*, *Williams*, nor *Bowerman* knew at that time that the *Summerfield* property had been mortgaged to the *Fourth City Society*. The genuine conveyance to *Downs* of the *Summerfield* property was in the custody of the solicitors of subsequent mortgagees who had disclaimed all interest in the property.

Downs was further entitled in fee simple to other land known as the "*Glenmore House* property," which had also been conveyed to him by the *British Land Company* by an indenture of the 15th of February, 1873.

On the 3rd of April, 1873, he mortgaged this property by deed to the *Liberator Society*, and subsequently gave the same society further charges on it.

On the 19th of December, 1876, *Downs* mortgaged the *Glenmore House* property to *Frederick* and *Thomas Marson*. At the time when the *Marsons* were negotiating with *Downs* for a loan to

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him on the security of this property, they had no notice of any prior incumbrance on it; but before the execution of their mortgage deed they became aware of the *Liberator Society's* mortgage, and accordingly, on the same day that *Downs* had executed his mortgage to them, but subsequently to such execution, the *Marsons*, at *Downs'* request, paid to the *Liberator Society* all sums secured to the society by the mortgage of April, 1873, and the further charges. On the same day the *Liberator Society* indorsed upon the last-mentioned mortgage deed a statutory receipt pursuant to the *Building Societies Act*, 1874, and the deed so indorsed was handed over by the society to the *Marsons*, together with the original conveyance from the *British Land Company*.

On the 20th of April, 1875, *Downs* mortgaged the *Glenmore House* property to the *Fourth City Society*. As in the case of the *Summerfield* property, he concealed from that society the fact of there having been any prior mortgage on the *Glenmore House* property, and handed over to them a forged conveyance by the *British Land Company*. He subsequently gave the *Fourth City Society* further charges on the same property.

On discovering the frauds which had been practised upon them by *Downs*, the *Fourth City Society* brought the first-mentioned action against the other mortgagees of the *Summerfield* and *Glenmore House* properties, claiming to have it declared that they, the Plaintiffs, were entitled to rank as first mortgagees of the *Summerfield* property, with the right of taking and consolidating therewith their *Glenmore House* securities; and they further claimed foreclosure and sale of the mortgaged properties.

With regard to the *Summerfield* property the Plaintiffs submitted, first, that the legal estate was still outstanding in the *Liberator Society*, on the ground that the seal of the society had not been affixed to their statutory receipt in accordance with the rules of the society, which required the seal to be affixed under the authority of a resolution for the purpose to be passed by the board of directors at the request of the trustees, in which case they, the Plaintiffs, would be the first equitable mortgagees: and, secondly, that if that receipt did in fact pass the legal estate, it vested it in *Downs*, and then in the Plaintiff by means of *Downs'* mortgage to them.

As to the *Glenmore House* property, the Plaintiffs said that the legal estate in it was still outstanding, on the ground, as in the case of the *Summerfield* property, that the seal of the *Liberator Society* had been affixed to the statutory receipts given by them without proper authority.

The Defendants, *J. Williams* and *Bowerman*, by their statement of defence, contended that the legal estate in the *Summerfield* property had become vested in them, on the ground that the effect of the statutory receipt in respect of this property, given by the *Liberator Society*, was to pass the legal estate therein to *Colman*, from whom it passed to *Downs* under *Colman's* reconveyance, and thence to them, the Defendants *J. Williams* and *Bowerman*, when they took their mortgage. The Defendants, the *Marsons*, contended that the legal estate in the *Glenmore House* property had passed to them when they paid off the *Liberator Society* as above stated.

Downs had been adjudicated bankrupt, and *W. Williams*, who had been appointed trustee of his property, was made a Defendant to the action.

Chitty, Q.C., and *Charles Walker*, for the Plaintiffs:—

The question is, who are the persons in whom the legal estate in the two properties in question is now vested, and who are therefore entitled to rank as first mortgagees.

First, we say that the receipts given by the *Liberator Society* did not in either case pass the legal estate in the properties, because the rules of the society were not complied with, which require that the society's seal must be affixed to a receipt pursuant to a resolution of the board of directors passed at the request of the trustees.

[JESSEL, M.R.:—Are there any trustees of the society now?]

No, because the Act of 1874 had the effect of making the society a corporation.

[JESSEL, M.R.:—In that case the rule is abrogated by the Act of 1874, and I shall hold that the seal was properly affixed, unless you can shew that the society did not receive the money.]

We must admit that we cannot shew that.

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[JESSEL, M.R.:—Then I hold that the seal was properly affixed.]

In that case, as to the *Summerfield* property, we submit that the effect of the receipt was to pass the legal estate to *Downs*. The words of the 42nd section of the *Building Societies Act*, 1874, are nearly the same as those of sect. 5 of the former *Building Societies Act* (6 & 7 Will. 4, c. 32), which latter section was discussed before Lord *Cairns* in *Pease* v. *Jackson* (1). In giving judgment his Lordship suggested two possible constructions of the section, the first of which he states as follows (2): "One construction might be, that if the mortgagor comes to the building society and pays off the mortgage money, and a receipt is indorsed stating that he, in one sense certainly the owner of the equity of redemption, has paid off the mortgage money, thereupon, without it being necessary for the trustees to give him on that payment a reconveyance of the property mortgaged, the property shall vest in him." That, we submit, is the effect of what has happened here, for *Downs* paid the money to the *Liberator*.

[JESSEL, M.R.:—He paid it out of *Colman's* money.]

In a sense that may have been so, but it was in reality *Downs'* money at the time when he paid, and the mortgage deed with the receipt indorsed was handed to him. The receipt, in fact, was given to him and operated to pass to him the legal estate.

The other possible construction of the section is thus stated by Lord *Cairns* (3): "Another construction might be this, that no matter who pays off the mortgage money, the receipt indorsed is to operate so that the legal estate in the mortgaged premises is to go at large to whichever of all the persons entitled in any shape or form to the equity of redemption has the best equity to call for the legal estate—a very difficult problem indeed to be solved, and not a very convenient way for the Act of Parliament to have provided for the disposition of the legal estate—a disposition which very often could not be exactly determined except through the medium of a Chancery suit." The way in

(1) Law Rep. 3 Ch. 576. (2) Law Rep. 3 Ch. 582.
(3) Law Rep. 3 Ch. 582.

which his Lordship stated the two alternative constructions shews that in his opinion the former is the one which ought to be adopted. The simplest rule is that the man who actually pays off the mortgage money gets the legal estate, in which case it went here, as we say, to *Downs*. Besides, he was the person "entitled to the equity of redemption." No person except the mortgagor can be said to be wholly entitled to the equity of redemption.

[JESSEL, M.R., referred to *Bell* v. *Blyth* (1).]

Davey, Q.C., and *B. B. Rogers*, for the Defendants *J. Williams* and *Bowerman*, were not called upon.

Davey, Q.C., and *Bardswell*, for the Defendants, the *Marsons*.

Marten, Q.C., and *S. Dickinson*, for other Defendants.

JESSEL, M.R. :—

The first question is, what is the meaning of the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42)? Of course the persons who framed the Act and copied into it sections from previous Acts, had no precise idea as to what an equity of redemption meant. They no doubt thought it was very easy to find out, but it is not easy to find out at all. The equity of redemption is sometimes vested in such a manner that until you get a decision of one or more Courts on a variety of obscure instruments, you cannot tell where it is; therefore it is simply a mistake to suppose it is a matter quite easy to find out.

All the Act of Parliament says (sect. 42) is, in the first place, that when all the moneys have been paid off the society may indorse or annex to the mortgage a reconveyance "to the then owner of the equity of redemption." Now let us see who it is to whom they ought to convey by law as the owner of the equity of redemption. By law, clearly, if there were several successive mortgages, each one framed as a conveyance, with a proviso for redemption, the owner of the equity of redemption to whom the society ought to convey, is that one of the several owners who is entitled to call for the conveyance; that is to say, where the

(1) Law Rep. 4 Ch. 136.

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ownership is split up the conveyance must be to the man entitled to call for it. Where, of course, there is only one owner, there is no question, but the ownership may be split up in a great variety of ways.

Where the ownership is split up by successive mortgages, the mortgagee of the equity of redemption is the real owner of the equity of redemption, subject to redemption. Then the ownership may be split up in another way, namely, through the property being held in undivided shares. And it may be split up in a third way, the commonest of all, namely, by settlement. A tenancy for life, portions, charges, jointures, remainders over, and so on—there may be a splitting up of the equity of redemption in that way. You must in each case ascertain who is entitled to call for a conveyence of the mortgaged property.

Then the section says that the society may reconvey to the then owner of the equity of redemption, "or to such persons and to such uses as he may direct." Does not that assume that he has a command of the estate—that he has a right to direct the conveyance?

Therefore, when you come to see to whom the mortgaged property is to be conveyed, you have a guide to the interpretation of the section as to the person or persons in whom it is to vest without conveyance. I do not think any lawyer would say that the reconveyance authorized by the Act is authorized to be made to anybody but the person who at law is entitled to call for it. "May indorse" merely means that the society may indorse a proper reconveyance upon the mortgage deed.

But there is an alternative mode of proceeding. Instead of a reconveyance to the then owner of the equity of redemption, the society may indorse a receipt, and then that receipt is to vacate the mortgage and vest the estate in the property "in the person for the time being entitled to the equity of redemption." Surely that is the same person as the owner of the equity of the redemption in the former part of the section. They are equivalent words; the reconveyance is not to be to one person and the vesting to be in another. They are alternative modes of getting the legal estate into the same person, that is, in the owner for the time being of the equity of redemption.

As I said before, when the equity of redemption is split up, the owner must be the person entitled by law to call for a conveyance. There always is such a person: there may be a difficulty in finding him out, but as a general rule it is not very difficult.

This is, in my opinion, the meaning of the Act; and consequently I have here to ascertain who was the person to whom the *Liberator Society*, on being paid off, ought to have conveyed under the first part of the section, and, when I have ascertained that, then that is the person in whom the legal estate vested under the second part of the section.

Now, in the case of the *Summerfield* property, of course, they ought to have conveyed to *Colman;* he was the person entitled to call for a conveyance, and therefore he was the person entitled to the benefit of the legal estate.

In the case of the *Glenmore House* property, where the *Marsons* furnished the money to pay off the mortgage, under the doctrine well known in equity, they have the best title to call for a conveyance.

That, in my opinion, makes the whole thing sensible, and in fact renders the case quite free from any real difficulty, beyond the inseparable difficulties which attend all dealings with real estate subject to the complicated law of this country relating to real estate.

I therefore decide that the legal estate in the *Summerfield* property is now vested in the Defendants *J. Williams* and *Bowerman*, and that the legal estate in the *Glenmore House* property is now vested in the Defendants the *Marsons*.

SECOND ACTION.

The second action, *Marson* v. *Cox*—which was an action by the *Marsons* claiming as first mortgagees of the *Glenmore House* property, against the other incumbrancers thereon—was rendered necessary owing to the *General Credit Company, Limited*, who were incumbrancers on that property, not having been made parties to the former action.

On the 25th of July, 1873, *Downs* deposited with the *General Credit Company*, as security for an advance, a deed purporting to be the conveyance to him of that property by the *British Land*

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Company, but which was in reality a forgery by him; and on the 24th of November, 1873, *Downs* executed a mortgage of that property by deed to the company, in consideration of a further advance made by them to him. These advances and the mortgage deed were therefore all prior to the 19th of December, 1876, on which day the *Marsons* had paid off the *Liberator Society's* mortgage on the *Glenmore House* property, and taken a statutory receipt from them. It was admitted that when the *Credit Company* made their advances to *Downs* they had no notice of the prior incumbrances on the property to the *Liberator Soceity;* and the only point of importance in the present action was, whether, under the circumstances, the legal estate in the *Glenmore House* property, formerly in the *Liberator Society*, had, by virtue of the statutory receipt given by that society when they were paid off, become vested in the *Credit Company*, and not in the *Marsons.*

Davey, Q.C., and *Bardswell*, for the Plaintiffs, the *Marsons*, were stopped by the Court.

Ince, Q.C., and *Phear*, for the Defendants, the *Credit Company:*—

We do not propose to re-argue the question decided by your Lordship in the *Fourth City Mutual* case, but we desire to argue a further point which does not appear to have been raised in that case. The point arises in this way: On the occasion of our mortgage we had handed to us what we believed to be a genuine deed of conveyance of the *Glenmore House* property to *Downs.* At that time the real deed was in the possession of the *Liberator Society*, who had also the legal estate in the property, but we had no knowledge of that. Then, in 1876, that is, after we had lent our money, the *Marsons* took an equitable mortgage of *Glenmore House.* The position of things then, at that moment, was this—there were two equitable mortgages, of which ours was the first, the legal estate being in the *Liberator Society;* and we submit that the effect of the payment off of the *Liberator Society* was to pass the legal estate to us as being, in the words of the statute, "the persons for the time being entitled to the equity of redemption." It is not as if the *Marsons*, when they paid off the *Liberator*, had taken a conveyance of the legal estate. In *Pease* v. *Jackson* (1), Lord *Cairns* decided

(1) Law Rep. 3 Ch. 576.

that the effect of a statutory receipt was to pass the legal estate either to the mortgagor or to the person who had the best right to call for it, but he did not decide more than that. However, in the *Fourth City Mutual* case, your Lordship decided that it went, not to the mortgagor, but to the person best entitled to call for it. We submit that the *Credit Company*—being prior in time, without any countervailing equity against them—is that person. *Pease* v. *Jackson* (1)—in which the contest was for priority as between second and third mortgagees in point of date—is distinguishable from this case, for there the second, or equitable, mortgagees, had not any title deeds; they knew they were only equitable mortgagees, and took no steps to get the legal estate. But here we intended to be legal mortgagees; we took what we believed to be a conveyance of the legal estate; and we had handed to us what we believed to be a genuine title deed. None of the reasons for which Lord *Cairns* decided against the equitable mortgagees in *Pease* v. *Jackson* apply here. The first was that they had distinct notice of a prior legal mortgage, and never intended to be more than equitable incumbrancers. But here we had no notice of any prior mortgage, and we intended and imagined ourselves to be legal mortgagees. The next reason was that the third mortgagees advanced their money for the express purpose of paying off the first legal mortgagees, and indeed paid it to them direct. Here, however, the second equitable mortgagees did not agree to advance their money expressly to pay off the *Liberator Society:* the society was paid off only under a subsequent arrangement between the second equitable mortgagees and *Downs*. Then Lord *Cairns'* third reason was that the third mortgagees expressly stipulated for, and obtained, possession of, the title-deeds: but so did we. In fact, Lord *Cairns* treated the case before him as a contest between two persons one of whom made no attempt to get the legal estate or the title deeds, whilst the other did; and he therefore decided in favour of the latter. But that is not the nature of the contest here. We therefore submit that we are entitled to rank in priority to the *Marsons*.

Everitt, Cozens-Hardy, Phipson Beale, and *H. A. Smith,* for the other Defendants.

(1) Law Rep. 3 Ch. 576.

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JESSEL, M.R. :—

As I understand the decision in *Pease* v. *Jackson* (1), it means this: the second mortgagee is asked to advance money to pay off the first mortgage. The second mortgagee says, "Very well; I will pay the money due to the first mortgagee to the first mortgagee direct: I will take the deeds and the legal estate direct from him." He goes to the first mortgagee with the assent of the mortgagor: the first mortgagee happens to be a building society, and says, "The way we convey a legal estate is by a receipt endorsed;" and thereupon the second mortgagee pays the money and takes away the deeds. It turns out afterwards that there is a secret mortgagee and equitable owner claiming under a security prior in date to the second mortgagee. As I understand, Lord *Cairns* says that by the transaction between the building society and the second mortgagee, there is an implied, if not an express, contract between the society, or their trustees, and the mortgagee, that if he gives them the money they will give him the legal estate. Through something unknown to either the society or the second mortgagee there may be a question on the statute, but the delivery of the deeds to the second mortgagee is intended to operate in pursuance of that contract or arrangement, and the man who pays his money to the owner of the legal estate under such a contract, expressed or implied, has a better right to call for it than the man who paid and got nothing.

That appears to me intelligible: I do not suppose that anybody would doubt that if the second mortgagee went to the first mortgagee and actually paid him money with the express contract to convey the legal estate, he would have a better right to call for it in respect of the money so paid than the man who paid and got nothing; and so, if it is implied by the contract that he is to have the legal estate, as I understand it was in *Pease* v. *Jackson*, he has the better title.

Then there is a second point which I understand was not argued at all on the part of the respondents in *Pease* v. *Jackson*, and was certainly assumed by me as counsel for the Appellants, namely, that if the second mortgagee was entitled to the legal estate he was entitled to it altogether. Now if he were entitled to call for

(1) Law Rep. 3 Ch. 576.

it at all, and it had not been conveyed, I can quite understand such an equity as Lord *Cairns* points out—that his title was to call for it and hold his security *pro tanto;* but if the legal estate passes by statute to the person who has the best title to call for it, then the legal estate is in him, and all the consequences must follow.

Then, the legal estate being outstanding, and there being only a contract to convey, it might be said, "You are only entitled to call for it to the extent of securing what you are to pay;" and then there would be no equity to take it from the first mortgagee except on the terms of consolidation.

That is the point which seems to me not to have received sufficient consideration in *Pease* v. *Jackson* (1), and which certainly was not argued. I am satisfied that what Lord *Cairns* meant in *Pease* v. *Jackson* was, that he relied on the intention of the parties to the transaction that the second mortgagee should pay the money to the first mortgagee and get the legal estate, and consequently the statute gave the second mortgagee the legal estate. That being so, it appears to me that in this case the *Marsons* get the legal estate for all purposes.

Not only do I not complain that Mr. *Ince* has argued the question, but I am very glad he has done so.

I therefore decide that the legal estate in the *Glenmore House* property is vested in the Plaintiffs, the *Marsons*, as first mortgagees.

Solicitors: *H. R. G. Fowkes; T. F. Martin; Wilkinson & Drew; Marson & Dadley; Worthington Evans; J. E. Carter; J. Best; S. B. Booth.*

(1) Law Rep. 3 Ch. 576.

M. R.

1880

March 5.

In re A SOLICITOR.

Practice—Notice of Motion for Attachment—Service—Rules of Court, 1875, *Order* XLIV., *r.* 2; *Order* LIII., *rr.* 1, 3.

A notice of motion in any action or matter for the issue of a writ of attachment under Rules of Court, 1875, Order XLIV., rule 2, may be served by leaving the same at the place of residence of the party affected thereby. *Browning* v. *Sabin* (1) explained.

THIS was a motion for the issue of a writ of attachment against a solicitor for disobedience to an order made on an original petition requiring him to deliver certain documents of title to his client, the petitioner.

The order made on the petition had been served personally on the solicitor, and the notice of motion had been served by leaving it at his residence.

Solomon, for the motion:—

The only question is, whether service of the notice of motion at the residence of the party is sufficient. I submit that it is, and that personal service is unnecessary. In *Browning* v. *Sabin* (1) your Lordship held, in an action, that, under Rules of Court, 1875, Order XLIV., rule 2, service of the notice of motion upon the solicitor to the defaulting defendant was "notice to the party" within the meaning of that rule. Under the old practice a notice of motion might be served either on the party personally or at his residence: Cons. Ord. III., rule 6. There being no express order under the new practice applicable to this case, I submit that the old practice should prevail.

The solicitor did not appear.

JESSEL, M.R.:—

The reason why I decided in *Browning* v. *Sabin* that service of the notice of motion upon the solicitors on the record was sufficient was because, in a suit, service on the solicitor was always

(1) 5 Ch. D. 511.

treated as service on the party. That mode of service would, therefore, be "notice to the party" within the meaning of Order XLIV., rule 2, which provides that "no notice of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued."

Order LIII., rule 1, provides that, "Where by these rules any application is authorized to be made to the Court or a Judge in an action, such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion." Then Rule 3 of the same Order provides that, "Except where by the practice existing at the time of the passing of the said Act any order or rule has heretofore been made *ex parte* absolute in the first instance, and except where by these rules it is otherwise provided, and except where the motion is for a rule to shew cause only, no motion shall be made without previous notice to the parties affected thereby." So that under Order LIII., rule 3, the mode in which any motion—other than a motion in any of the excepted cases—is to be made is on "notice to the party," the words being the same as in Order XLIV., rule 2.

It is quite clear, therefore, that in an action, and also in any other matter, the application is to be made in the mode in which motions are usually made, that is, after notice of motion to the party affected.

Now, the ordinary way, before the Judicature Acts, in which a notice of motion was given in a matter was by leaving it at the place of residence of the Respondent, and I see no reason for changing that practice.

I think, therefore, that the service in the present case was sufficient, and I accordingly make the order for attachment, with costs.

Solicitor: *J. I. Solomon.*

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Jan. 22.

SIMMONS *v.* STORER.

Costs—Taxation—Order directing an Account of what is due for Costs of Proceedings to enforce Judgment—Discretion of Taxing Master—Objection in Writing to Taxing Master's Certificate—Rules of Court, 1875 (*Costs*), ~~Order VII.~~, *rr.* 26, 30.

Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken by him to enforce a judgment in the Exchequer Division, the Taxing Master to whom the bill of costs was referred disallowed the costs of certain abortive garnishee summonses. On a summons to review the taxation:—

Held, that the Taxing Master was not precluded by the form of order from disallowing any costs that he thought proper, and that, under Rules of Court, 1875 (Costs), Order VII., r. 26, he was bound to do so; also that the costs in question were properly disallowed.

When a party carries in an objection in writing to the certificate of a Taxing Master under Rules of Court, 1875 (Costs), ~~Order VII.~~, r. 30, he is only bound to state the items to which he objects, not the reasons of his objection.

THIS case came before the Court on an adjourned summons, taken out by *Storer*, the Defendant in the present action, to review taxation.

A previous action of *Storer* v. *Simmons* in the Exchequer Division had been brought by the present Defendant, in which he had obtained judgment. In order to enforce that judgment he had taken out six garnishee summonses, on which no further proceedings had been taken. He had then taken out a seventh garnishee summons, upon which a sum had been paid into Court by the garnishee. He had then brought an action against the garnishee to recover a larger amount, which was defended successfully.

At the hearing of the present action, which was brought by *Simmons*, the Defendant in the action in the Exchequer Division, against *Storer*, an order was made directing an account of what was due to *Storer* upon his said judgment, and in respect of the costs of the proceedings taken by *Storer* to enforce the same.

The Chief Clerk referred *Storer's* bill of costs as between party and party to the Taxing Master of the Exchequer Division. When the bill came before the Taxing Master he disallowed the

costs of the six garnishee summonses on which no further proceedings had been taken, and only allowed the costs of the seventh summons up to the time of the payment into Court by the garnishee.

Storer thereupon carried in the following objections to the taxation: First, that as his right to the costs had been established by the judgment the Taxing Master had no right to disallow them altogether, but only to see that the proceedings charged for had been really taken, and, if necessary, to moderate the charges; Secondly, that the reference to the Taxing Master by the Chief Clerk was only to tax the bills, and not to decide any question of liability.

These objections having been overruled by the Taxing Master, *Storer* took out the present summons, which was adjourned into Court.

Davey, Q.C., and *H. Humphreys*, in support of the summons:—

The costs in question have been improperly disallowed. Under the order directing an account of what was due to *Storer* in respect of the costs of the proceedings taken by him to enforce his judgment, *Simmons* was liable to pay them, subject only to their taxation. The question whether there was any liability in respect of the costs of the garnishee summonses which proved abortive should have been raised by *Simmons* at the trial, when evidence could have been adduced to shew that those proceedings were necessary and proper. That question cannot be raised now, and, even if it could, we submit that the mere fact of the summonses not having been proceeded with is no reason why the costs should have been disallowed.

JESSEL, M.R.:—

The order in the present action was that an account should be taken of what was due to *Storer* in respect of the judgment in the action in the Exchequer. He appears to have taken out certain garnishee summonses, and, according to the practice at Common Law, if you issue execution, the costs of the execution are payable out of the execution, and, a garnishee order being another form of execution, the same rule applies, and this appears to me to be the

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reason of the Taxing Master's decision. The costs, therefore, are due to *Storer*, not from *Simmons*, but from the garnishees.

With reference to the objection taken by the counsel for *Storer*, when an order is made for taxation of costs, if it is intended that any costs are not to be taxed it should be so stated, otherwise a general direction to tax is implied, the meaning of which is a direction to ascertain what, if anything, is due for costs. If it turns out that the proceedings in respect of which the costs were incurred were improper, then no costs ought to be allowed. There is nothing in the form of this order which precludes the Taxing Master from disallowing all the costs. It is immaterial that the order only directs an inquiry as to what is due in respect of costs without containing a direction to tax them. The only difference is that in the former case the Chief Clerk might have decided the question of costs himself, whereas if there had been a direction to tax the costs, it must necessarily have gone before a Taxing Master.

By Rules of Court, 1875 (Costs), ~~Order xxi.~~ Sched. I, r. 26, it is provided that "As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the Taxing Officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the Taxing Officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party." Under this rule the Taxing Master is bound to disallow these costs if he thinks fit, and it seems to me that his decision was right.

Davey, Q.C., and *H. Humphreys*, for *Storer*, further contended that it could be shewn that there was an agreement between the parties that all the costs of these proceedings should be paid by *Simmons*.

Chitty, Q.C., and *Whitehorne*, for *Simmons* :—

This point cannot now be raised. If there was such an agreement it should have been stated in the objections in writing which were laid before the Taxing Master by *Storer*.

This is clear from Rules of Court, 1875 (Costs), ~~Order~~ VII., r. 30, which provides as follows : "Any party dissatisfied with the

allowance or disallowance by the Taxing Officer of the whole or any part of the items of a bill may at any time before the certificate or allocatur is signed deliver to the other party interested therein and carry in before the Taxing Officer an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or part or parts thereof, objected to, and may thereupon apply to the Taxing Officer to review the taxation in respect of the same." Again, rule 32 of the same Order, after providing that any party dissatisfied may apply to a Judge in Chambers to review the taxation, provides that "the certificate or allocatur of the Taxing Officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

JESSEL, M.R. :—

The order referred to does not require the party who carries in his objection in writing before the Taxing Officer to state the reasons of his objection: he is only required to state the items he objects to. The Taxing Master is required to state his reasons in writing, but that is chiefly for the information of the Court when it is asked to review the taxation.

[His Lordship, after hearing the question whether there had been any contract between the parties further argued, dismissed the summons.]

Solicitors for Plaintiff: *Wilkins, Blyth, & Fanshawe.*
Solicitors for Defendant: *Pritchard, Englefield, & Co.*

V.-C. M. 1880 *March* 11.

EGREMONT BURIAL BOARD *v.* EGREMONT IRON ORE COMPANY.

[1879 E. 159.]

Production of Documents—Rules of Court, 1875, *Order* XXXI., *rr.* 11, 12—*Motion by Defendant before Defence filed—Plaintiff entitled to Fee—Title Deeds.*

The Defendants, before putting in their statement of defence, moved for the production by the Plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals:—

Held, that, the land having been conveyed to the Plaintiffs in fee simple, they were *primâ facie* entitled to the land down to the centre of the earth, and unless the Defendants could shew that they were not so entitled the Plaintiffs could not be compelled to produce their title deeds.

THIS action was by the *Egremont Burial Board* to restrain the *Egremont Iron Ore Company* from improperly working a mining shaft under the Plaintiffs' cemetery, so as to loosen the earth under the graves and injure the Plaintiffs' property. The cemetery was constructed upon land conveyed to the Plaintiffs in fee by Lord *Lonsdale*.

The Defendants had obtained from Lord *Lonsdale* a right of searching for and working the minerals in the district of *Egremont*, and they had been working a mine by means of a shaft which passed under the Plaintiffs' cemetery. In this operation they had neglected to carry the shaft to a sufficient depth, and had caused the earth to sink in, and one of the coffins had fallen through into the mine, and the cemetery wall had been damaged.

Whitehorne, for the Defendants, who had not yet filed their statement of defence, moved for the production by the Plaintiffs of their purchase deed and such other documents as would shew the Plaintiffs' title:—

The object of the Defendants is to ascertain whether the Plaintiffs have purchased the whole property on which the cemetery stands, including the mines and minerals under the land, or whether they have only purchased the surface land with a reser-

vation of the mines and minerals. In the former case we shall at once submit to an injunction and pay the costs of the action; in the latter case we are prepared to give an undertaking to work our mine in such a manner as to preclude any further damage to the Plaintiffs' property. If there is a reservation of minerals in the Plaintiffs' purchase deed, then the Defendants may work the mines underneath the cemetery, making compensation for the damage the Plaintiffs may sustain: *Aspden* v. *Seddon* (1). It is right that the Defendants should have the earliest intimation as to the nature of the Plaintiffs' title. By the Rules of Court, 1875, Order XXXI., rr. 11 and 12, the Court is given power at any time during the pendency of an action to order the production by any party thereto, upon oath, of such documents as it shall think fit. The most absolute power is, therefore, given to order production of any document at any stage of the proceedings. This was acted upon in *Hawley* v. *Reade* and in *Mercantile Insurance Company* v. *Shoesmith*, both cases before Mr. Justice *Archibald* in Chambers on the 2nd of February, 1876; and in *Union Bank of London* v. *Manby* (2).

Bristowe, Q.C., and *T. A. Roberts*, for the Plaintiffs:—

We cannot be compelled at this stage of the proceedings, if at all, to produce our title deeds. We are the owners in fee of an estate. The Defendants come and do us an injury which renders it necessary for us to bring an action to restrain the injury, and then, before they put in a statement of defence, they apply to the Court to order us to produce our title to the property. This case is governed by the 1st rule of Order XXXI., which says that the defendant may at any time after delivering his defence, or at any subsequent time, deliver interrogatories for the examination of the opposite party. But he cannot apply for documents before putting in his defence. That was decided in *Disney* v. *Longbourne* (3). Then in *Hancock* v. *Guerin* (4) it was laid down that as a general rule a plaintiff is not entitled to a discovery of documents until a defence has been delivered, because until a defence is delivered it cannot be known what the matters in question are; and in the

(1) Law Rep. 10 Ch. 394.
(2) 13 Ch. D. 239.
(3) 2 Ch. D. 704.
(4) 4 Ex. D. 3.

V.-C. M. 1880 EGREMONT BURIAL BOARD v. EGREMONT IRON ORE COMPANY.

Union Bank of London v. *Manby* (1), Lord Justice *James*, in commenting upon *Hancock* v. *Guerin* (2), observed that there was a great deal to be said in support of the proposition that it ought not to be a matter of course for a plaintiff to rush in at once with an application for production of documents, and the Court ought to have power of refusing production; and his Lordship further said that the case in the Exchequer Division did not compel a Judge in the Chancery Division to alter the practice which was established in the Court of Chancery. All this applies equally to the case of a defendant applying for production, and that decision, therefore, amounted to this, that as a general rule the defendant is not entitled to production of documents until he has put in his defence, but there may be cases in which such a course is desirable.

Whitehorne, in reply, cited *Republic of Costa Rica* v. *Strousberg* (3), in which Lord Justice *Baggallay* guarded himself against expressing any opinion as to the right of applying for production of documents previously to the delivery of the statement of claim.

MALINS, V.C.:—

This case involves a general principle of law. The Plaintiffs state that they are in possession of this land under a conveyance to them in fee in the year 1863. There is no question about the fee simple of the property having been conveyed to them, and under that conveyance they entered into possession. That being so, the Plaintiffs are entitled to the land down to the centre of the earth, and no one is entitled *primâ facie* to interfere with their rights. The burthen is upon the Defendants to shew that they are not so entitled. But the Defendants, notwithstanding that, have bored a shaft through the Plaintiffs' land, and in doing so they have caused the ground of the cemetery to sink, and one of the coffins has actually fallen through into the shaft. The Defendants now require the Plaintiffs to produce their conveyance, for the purpose of ascertaining whether there is a reservation of minerals, but this raises the question whether a man, being in

(1) 13 Ch. D. 239. (2) 4 Ex. D. 3.
(3) 11 Ch. D. 323.

possession of land conveyed to him in fee simple, is in any way bound to produce his title deeds.

There was a case before me of the *Corporation of Hastings* v. *Ivall*, and my judgment is reported on the hearing of the appeal (1). I there intimated an opinion that if the question between the parties had rested solely upon the passage in the affidavit in which the Plaintiffs claimed protection on the ground that the documents were "title deeds and documents evidencing and shewing the title of the Plaintiffs to the beach in question in the suit," it would sufficiently protect the documents, and production of them could not be enforced. I remain of the same opinion, and as these Plaintiffs are in possession of the property under a conveyance to them in fee simple, they cannot be ordered to produce their title deeds.

I will add this, however, that as a matter of expediency it is desirable that the Defendants should have production at the earliest time, on the ground that if there is no reservation of the minerals in the conveyance to the Plaintiffs, then the Defendants' case is at an end. It is, therefore, for the interest of both sides that the Defendants should have this information as early as possible. The motion must be refused, but the costs will be costs in the action.

Solicitors: *Helder, Roberts, & Gillett; Nash & Field.*

(1) Law Rep. 8 Ch. 1019, n.

V.-C. M.
1880
March 19.

In re JOHNSTONE'S SETTLEMENT.

Settlement—Execution of a Power—Change of Investment—Ademption of Legacy.

15 Ch D 484

By a post-nuptial settlement a specific sum of bank annuities was settled so as to give the wife a general power of appointment by will. Three days after the settlement the wife made her will in execution of the power, and apportioned the sum of bank annuities between three appointees. Subsequently a portion of the bank annuities was, with the consent of the wife and her husband, sold out under a power of varying securities contained in the settlement, and invested in railway stock:—

Held, that the legacies appointed by the will were not adeemed by the subsequent change in the investment of the fund, but that the appointees took the railway stock in the proportions in which the bank annuities were appointed to them by the will.

BY a voluntary settlement, executed on the 30th of March, 1872, and made subsequently to the marriage of the Rev. *T. B. Johnstone* and *Mary Ann* his wife, it was agreed and declared that a sum of £3606 bank annuities, to which *Many Ann Johnstone* was entitled for her separate use, and which had been transferred into the names of trustees, should be held by them upon trust to retain the trust premises in the then state of investment, or from time to time, with the consent of the husband and wife or the survivor of them, to change and vary the investments of the trust premises or any part thereof, and upon trust, during the joint lives of the husband and wife, to receive and pay the income to *M. A. Johnstone* for her separate use, and after the decease of either of them, upon trust to pay the income to the survivor, and after the decease of the survivor, upon trust to transfer and assign the trust premises unto and amongst such person or persons in such shares and for such interest as *M. A. Johnstone*, whether covert or sole, should by will direct or appoint, and in default of appointment, upon trust for the children of *M. A. Johnstone*, living at the date of the settlement, to be divided equally between them.

M. A. Johnstone made her will, dated the 2nd of April, 1872, whereby, after reciting that by the settlement £3606 bank annuities stood "settled upon trust for investment as therein mentioned,"

and upon further trust, during the lives of herself and her husband, to pay the income thereof to her for her separate use, and after the decease of either of them, upon trust to pay "the income of the said trust premises" to such survivor and after the decease of such survivor, "the said trust premises, and the income thereof" were to be held upon trust to pay and transfer the same unto and amongst such persons as she should by will appoint; she did, in exercise of the said power and of any other power then or at her decease enabling her, direct and appoint that subject to the life interest of her husband, if he survived her, in the whole of the said sum of £3606 bank annuities, the sum of £2000 bank annuities, part of the said sum of £3606 like annuities, should belong to and be held in trust to pay and transfer the same and the income thereof unto her daughter *Margaret Bourchier*, widow, absolutely; and that the sum of £1000 bank annuities, other part of the said sum of £3606 like annuities, should belong to and be held in trust to pay and transfer the same and the income thereof to her granddaughter *Harriet Money*, absolutely, and that the residue of the said sum of £3606 bank annuities should belong to and be held in trust to pay and transfer the same and the income thereof to her son *Arthur Johnstone* absolutely.

In March, 1873, the sum of £2519 bank annuities, part of the £3606 like annuities, was, with the consent in writing of *T. B. Johnstone* and his wife, sold by the trustees of the settlement, and the proceeds, amounting to £2317, were invested in the purchase, in the names of the trustees, of £2000 guaranteed £5 per cent. stock of the *Great Western Railway Company*, so that at the death of *M. A. Johnstone*, which took place in January, 1874, the property subject to the trusts of the settlement no longer consisted of the £3606 bank annuities, but of the sum of £1087 bank annuities, and £2000 stock in the *Great Western Railway Company*. *T. B. Johnstone* died in December, 1878, and the trust property then still consisted of the £1087 bank annuities and the £2000 railway stock.

Upon the trustees proceeding to distribute the trust funds held under the settlement, doubts were suggested whether the disposition made by the will of *M. A. Johnstone* might not be held to be partially adeemed or rendered ineffectual by the change of invest-

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ment made in March, 1873, and whether the £2000 *Great Western* stock did not devolve as unappointed and go to the five children of *M. A. Johnstone* who were surviving at the date of the settlement, and the personal representatives of such of them as had since died. The trustees, however, were advised by counsel that the disposition by the will of *M. A. Johnstone* was not adeemed or affected by the change of investment, and that the property subject to the settlement was distributable between the three appointees under the will, in the proportion of £2000 to *Margaret Bourchier*, £1000 to *Harriet Money*, and £606 (residue of the £3606) to *Arthur Johnstone*.

It appeared that all the parties interested had, in accordance with the advice of counsel, consented to the funds being distributed in that way, except the executors of *Walter Johnstone*, one of the children, who had since died, such executors being advised that they could not safely assent to the property being so distributed. Accordingly, the trustees divided all the money except the share to which *Walter Johnstone* and his representatives would be entitled in the £2000 *Great Western* stock, if that stock devolved as unappointed, and paid his share, amounting to £486 6*s.* 8*d.*, into Court.

By arrangement with *Margaret Bourchier*, the appointee taking the largest share under the will, the amount paid into Court had been retained out of her share, and she now presented a petition for payment out of that amount to herself, upon the footing of there being no ademption.

Borrett, in support of the petition:—

It is quite certain in this case what the intention of the testatrix was. She had a power of appointment over a particular fund, which was, at the time when she executed the power, three days only after the settlement, invested in bank annuities. She shews by the recitals in her will that she had in contemplation the possibility of the investment being changed, and she intended to appoint the whole trust property in whatever state of investment it might be. There was no other fund subject to the settlement to which she could have referred, and she disposed of the whole of that fund. The only question, therefore, is whether the

Court is constrained by any rule as to ademption of legacies to decide contrary to the manifest intention of the testatrix. But in those cases the testator has been dealing with property of which he was absolute owner.

Here the fund was settled, and part of it was sold out under the provisions of the settlement, and was reinvested in another security, with the consent of the tenants for life, but the whole fund remained subject to the power of appointment, and the true view is to read the appointments made by the will as limitations introduced into the settlement, and so subject to the provisions of the settlement, including that for changing the securities. The only authority which seems opposed to this view is *Gale* v. *Gale* (1), but that case was disapproved of by Lord *St. Leonards* (2), and both he and Mr. *Roper* (3) were of opinion that the mere subsequent change of the investment, though made with the concurrence of the appointor, ought not to defeat the appointment of the fund in its then present state.

Pollock, for the executors of the deceased son claiming a share as unappointed :—

The case of *Harrison* v. *Jackson* (4) is a decision in our favour. In that case there was a bequest of a sum of stock in the *London and North Western Railway Company*, which the testator referred to as being then standing in the names of trustees, but which stock it was his intention to have transferred into his own name. The stock was never transferred into the testator's name, but was paid off by the company and reinvested by the trustees, at the testator's desire, in other securities. The Master of the Rolls, in holding that the legacy was adeemed, considered that where a testator sold any specific fund after making his will, and invested the proceeds in any other security, it made no difference whether he purchased any similar security, or whether he purchased horses, or anything else, and neither the other security nor the horses would pass under the bequest.

Northmore Lawrence, for the trustees.

(1) 21 Beav. 349.
(2) Sug. on Powers, 8th Ed. p. 309.
(3) Roper on Legacies, 3rd Ed. p. 291.
(4) 7 Ch. D. 339.

V-C. M. MALINS, V.C.:—

1880

In re JOHNSTONE'S SETTLEMENT.

I have no doubt whatever in my mind what ought to be my decision in this case. There was a voluntary settlement executed by Mr. and Mrs. *Johnstone* on the 30th of March, 1872, of the sum of £3606 bank annuities, and that settlement gave Mrs. *Johnstone* a general power of appointment by will of the trust premises, and in default of appointment, then the property was to be divided equally between the then surviving children of Mrs. *Johnstone*. Three days after the settlement Mrs. *Johnstone* made her will, which recited the settlement, and was expressed to be in execution of the power of appointment contained therein, and by that will she directed and appointed that, subject to the life interest of Mrs. *Johnstone* in the whole of the £3606 bank annuities, the sum of £2000 bank annuities, part of the £3606, should be held in trust for her daughter, and the sum of £1000 bank annuities in trust for her granddaughter, and the residue for her son. So the testatrix parcels out this sum of £3606 between the three persons named. After that will was executed it became desirable to alter the investment of the money, for which there was ample power given by the settlement, and in pursuance of that power, and with the requisite consent of Mr. and Mrs. *Johnstone*, part of the bank annuities was sold out by the trustees and invested in their names in *Great Western* guaranteed stock, and so it remained till the death of the testatrix. The question now is, whether by that change of the investment there has been what is called an ademption of the legacies so given by the will. My opinion clearly is that there has been no such ademption, because when the testatrix doled out these sums she meant to appoint the fund which was subject to the settlement and over which she had the power of appointment, and this fund does not cease to be the fund subject to the power in the settlement by its being invested in a different security. It is not less the fund comprised in the settlement by being invested in *Great Western* guaranteed stock. In *Gale* v. *Gale* (1) there was an appointment of real estate which was afterwards sold. There it was held that the money produced by the sale did not go to the appointees of the estate. But Sir *E. Sugden*, in his work upon Powers (2), makes this observation: "Supposing

(1) 21 Beav. 349. (2) 8th Ed. p. 309.

a personal fund to be settled on a marriage in like manner as the real estate was in *Gale* v. *Gale* (1), and there was a power in the settlement to vary the securities, it could hardly be held that an appointment by will of the fund in its then present state would be defeated by a variation in the investment of it under the power for that purpose, subsequently to the will." That would have been my opinion if there had been no authority to support it, but I am told by Mr. *Pearson* that in a recent case of *Adye* v. *Adye*, decided by Mr. Justice *Fry*, and affirmed on appeal, where certain real estate was appointed under a power, and that estate was sold and the money invested, it was held that the donee of the power took the produce of the sale. This is a much stronger case than that, because here the property remains personal estate. Therefore, as this change of investment took place in exercise of the powers contained in the settlement, my decision is that the fund is to go to the persons named in the will, and in the same proportions. The money in Court will be paid to the Petitioner.

Solicitors: *Hunters, Gwatkin, & Haynes.*

In re HOME INVESTMENT SOCIETY.

Winding-up—Unsuccessful Litigation—Summons—Costs—Priority.

Where an official liquidator has failed on a summons to recover money for the company, and has been ordered to pay the costs of the summons out of the assets of the company, these costs will be paid out of the assets in priority to the costs of the winding-up.

MR. *BRABANT* had been solicitor to a company called the *Home Investment Society*, and a sum of £236 had been received by him from the company shortly before the company was ordered to be wound up. The official liquidator applied by summons to have this £236 repaid; but Mr. Justice *Fry*, sitting for Vice-Chancellor *Malins*, on the 28th of July, 1879, dismissed the summons, with costs to be paid by the liquidator out of the assets of the company. On the 5th of November, 1879, an order was made for the

(1) 21 Beav. 349.

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taxation and payment of the liquidator's costs in the winding-up. Mr. *Brabant* then applied by summons for a declaration that he was entitled to be paid his costs of the dismissed summons in priority to the costs of the liquidator, and that the taxation of the costs of the liquidator might be stayed pending this application. It was stated that the assets of the company would be insufficient for the payment of both sets of costs.

Locock Webb, Q.C., and *Brabant*, in support of the summons:—

This was an adverse litigation against Mr. *Brabant*, and he having succeeded, is entitled to his costs out of the assets of the company, just as if an action had been brought against him and had been dismissed. There are distinct authorities on the subject: *Bailey and Leetham's Case* (1); *Ex parte Smith* (2); *Ex parte Watkin* (3).

Higgins, Q.C., and *Chester*, for the liquidator:—

The costs of the winding-up take precedence over everything else: 25 & 26 Vict. c. 89, s. 144, and *Brabant* can only come in as a creditor. A winding-up is not like an administration suit; it is the company which owes, not the liquidator. This is a proceeding in the liquidation, and the costs can only be paid accordingly. At all events, the costs of realizing the assets must first be paid, or else Mr. *Brabant* will get the benefit of the expense incurred by the liquidator. *In re Marlborough Club Company* (4) has never been overruled: *In re Dimson's Estate Fire Clay Company* (5). The liquidator took the proceedings for the benefit of the creditors, of whom Mr. *Brabant* was one, and he can only come in as a creditor.

MALINS, V.C.:—

I confess I am surprised at the length of the argument upon this question, which seems to me to be settled, not only by authority, but on every possible principle.

The case is this: The *Home Investment Company* was ordered

(1) Law Rep. 8 Eq. 94.
(2) Ibid. 3 Ch. 125.
(3) 1 Ch. D. 130.
(4) Law Rep. 6 Eq. 519.
(5) Law Rep. 19 Eq. 202.

to be wound up in the month of May, 1878. Mr. *Brabant*, the present applicant, had been the solicitor of that company; and, shortly before the winding-up, sums amounting to £236 had been paid to him for costs. The official liquidator's attention was drawn to this, and, thinking that these sums were paid under such circumstances as that they ought not to be retained by Mr. *Brabant*, he took out a summons against Mr. *Brabant* to recover them back. The liquidation was pending before me, but during my illness the summons was heard by Mr. Justice *Fry*, who on the 28th of July last made an order "That this Court doth not think fit to make any order on the said application, but doth order that the official liquidator do, out of the assets of the above-named company, pay to *Frederick Awdry Brabant* his costs of the said application, such costs to be taxed by the Taxing Master." Now this proceeding had been an attack upon Mr. *Brabant* by the official liquidator, made by way of summons, but precisely the same as if it had been by action. If there had not been a winding-up order, the recovery of that money would have been the subject of an action, but, being in the winding-up, it was by summons, which proceeding entirely failed; and Mr. Justice *Fry* having decided the matter, I have declined to hear anything about the merits of the case. Mr. *Brabant* has been put to the expense of more than £100 on the summons, and, there being a deficiency of assets, it is now said that, instead of being paid his costs out of the assets of the company, he is only to be paid his costs after the official liquidator has been paid all his costs, the consequence of which would be that Mr. *Brabant* would never get a penny. Is that justice? Is there any principle in that? Is there any sense in it? I can only say that I think it is contrary to every principle of common sense, and contrary to every principle of justice, and, fortunately, it is contrary to the decided cases.

What does principle point out under such circumstances? The official liquidator chooses, properly or improperly, to enter into litigation with a person whom he thinks liable to pay a sum of money to the company. There turns out to be no liability. What does justice require? That the person who has been put to expense should recover his expenses, and that he should have them out of the assets of the company. It is not asked that the

V.-C. M. 1880 *In re* HOME INVESTMENT SOCIETY.

official liquidator should personally pay, but that he should pay out of the assets of the company. Then Mr. *Higgins* seriously referred me to the 144th section of the *Companies Act* of 1862 as conclusive upon the subject. Now, what is the 144th section? "All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims." But that must mean in priority to all claims upon the company when the order to wind up was made, and no others, and it has nothing to do with the question. This was not a liability of the company when the order was made, but a liability incurred by the official liquidator in an unsuccessful litigation with a third party.

Now, what are the authorities upon the subject? First of all, there is the decision of Lord Chancellor *Cairns* in *Ex parte Smith* (1), which is a remarkably strong case, because there the person against whom the action was brought was indebted to the company in a larger amount than the costs of the litigation, and it was said, therefore, and the Vice-Chancellor so decided, that the company were entitled to set off his costs against the debt; but the Lord Chancellor reversed that decision, and said that these costs were to be paid, that the solicitor had a lien upon whatever he could get for the costs, and therefore he had priority over the debts of the company.

The same question came before Vice-Chancellor *James* in *Bailey and Leetham's Case* (2), and the Vice-Chancellor put it very shortly that unless there was any enactment to the contrary, a company in winding-up ought to be dealt with as any other litigant, and if an action is brought or defended fruitlessly, the estate ought to be fixed with the costs.

Therefore, upon the authority of those cases also, Mr. *Brabant* must be paid out of the assets all the costs to which he has been improperly put by adverse litigation, in priority over the official liquidator, who has entered into this litigation at his own peril, and the order will be as asked for.

Solicitors: *F. A. Brabant; Watson, Sons, & Room.*

(1) Law Rep. 3 Ch. 125. (2) Law Rep. 8 Eq. 94.

BOLTON *v.* FERRO.

V.-C. B.

1880

April 8.

[1879 B. 105.]

Bankruptcy—Composition Deed—Secured Creditor—Bankruptcy Act, 1861, *s.* 197.

By a composition deed, dated the 4th of November, 1864, and duly registered under the *Bankruptcy Act*, 1861, a debtor, in consideration of a covenant on the part of himself and a surety to pay a composition of 10*s.* in the pound, obtained a release from his scheduled debts by a statutory majority of his creditors. The deed contained a proviso that every secured creditor should have the full benefit and advantage of his security, and should be entitled to the composition after allowing for the value of such security.

Amongst the secured creditors was one for £229 8*s.* 5*d.*, whose security was a policy of assurance on the life of the debtor. The creditor valued the policy at £16; and for the difference, namely, £213 8*s.* 5*d.*, he received the composition of 10*s.* in the pound. The policy having fallen in after some premiums had been paid by the creditor:—

Held, upon the construction of the deed, that the creditor, upon the execution of the deed, remained a creditor for £16 only, and that (the composition having been duly paid) the proceeds of the policy, after payment of £16 and interest, belonged to the debtor's estate, subject to repayment with interest to the creditor of premiums which he had paid.

ACTION.

On the 28th of January, 1864, *Samuel Bolton* sent or handed to the Defendants *Ferro & Hunt* a letter in these terms:—

"*London*, 28th January, 1864.

"Messrs. *Ferro & Hunt*,—I hereby transfer to you the enclosed policies in my favour—namely, £300 in the *Mutual Life Assurance Society*, No. 3486, dated the 16th of August, 1860, £200 in the *Union Life Office*, No. 11,201, dated the 15th of August, 1856, to be held by you as security against all current debts and interest claimed by you from me, and I hereby undertake to pay all yearly premiums, &c., due on said policies."

Enclosed with this letter were the two policies, of which only one, namely, the *Union* policy, was the subject of the present action.

On the 17th of February, 1864, *Samuel Bolton* executed an inspectorship deed for the benefit of his creditors, *William Newton*

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being the inspector. This deed was duly registered under the 192nd section of the *Bankruptcy Act*, 1861.

In the latter part of the same year *Samuel Bolton* got into further difficulties, and by a deed dated the 4th of November, 1864, and made between *Samuel Bolton* of the first part, *Richard Bolton* of the second part, *William Newton* of the third part, the several persons, companies, and firms whose names and seals were subscribed and set in the schedule thereunder written, being creditors of *Samuel Bolton*, of the fourth part, the said last-mentioned persons, companies, and firms, and all other, if any, the then existing creditors of *Samuel Bolton*, thereinafter called "the said creditors," of the fifth part, and *John Daniel Kähler* of the sixth part, after reciting the inspectorship deed, and that *Samuel Bolton* had agreed to pay to "the said creditors" a composition of 10*s.* in the pound, and that a majority in number representing three-fourths in value of "the said creditors" had agreed to accept the composition, and that "the said creditors have agreed in further pursuance of the said proposed arrangement to execute the defea sible release to the said *Samuel Bolton* hereinafter contained," it was witnessed that the inspectorship deed was thereby revoked, and in consideration of a covenant by *Samuel Bolton* as principal and *Richard Bolton* as surety to pay the composition of 10*s.* in the pound, "the said creditors" released the inspector *Newton*, and also released *Samuel Bolton*, "his heirs, executors, administrators, estate, and effects, of and from the amounts of their respective now existing debts, and of and from all actions, suits, claims and demands whatsoever, for or in respect of the same." The deed contained the following clauses:—

"Provided always, and it is hereby agreed and declared, that nothing herein contained shall prevent the said creditors or any of them from enforcing or otherwise obtaining the full benefit and advantage of any charge or lien which they or any of them now have or hath upon any estate or effects whatsoever, or from suing or prosecuting any other person or persons than the said *Samuel Bolton*, his heirs, executors, or administrators, who is, are, or shall or may be, liable or accountable to pay or make good to any of the said creditors all or any part of their respective debts; Provided also, that as to any debt or debts for which any creditor or

creditors may at the date of these presents hold or have any charge or lien upon any estate or effects of the said *Samuel Bolton*, such creditor or creditors respectively shall be entitled to the composition hereby provided, on and in respect of the amount of such debt or debts, after allowing for and deducting the value of such charges or liens as aforesaid."

This deed was duly registered under the provisions of the 192nd section of the *Bankruptcy Act*, 1861, on the 4th of November, 1864.

At this date there was owing from *Samuel Bolton* to the Defendants a sum of £229 8*s.* 5*d.* The Defendants valued the *Union* policy at £16, and represented themselves in the schedule and executed the same as creditors for £213 8*s.* 5*d.* They were duly paid the composition of 10*s.* on the debt of £213 8*s.* 5*d.*

Samuel Bolton died intestate on the 3rd of September, 1878, and administration was on the 21st of February, 1879, granted to the Plaintiff *Hannah Bolton*, his widow. The amount which on *Samuel Bolton's* death became due on the policy was £262.

In September, 1878, the Defendants sent an account to the Plaintiff as follows: First, they claimed the whole of the £229 8*s.* 5*d.* Then, deducting from this £106 14*s.*, which they had received in the composition, leaving a balance of £122 14*s.* 5*d.*, they added to this £85 18 6*d.* as fourteen years' interest at £5 per cent. on the debt from 1864 to 1878, and £119 18*s.* 9*d.* for premiums which they had paid, and interest at £5 per cent.

The Plaintiff, on the 23rd of February, 1879, offered to the Defendants to waive the accounts, and to allow the Defendants £150 out of the policy moneys and £20 for costs, making together £170, which was refused; and the Defendants having threatened proceedings against the assurance company, the latter, on the 21st of March, 1879, paid the £262 into Court.

The Plaintiff repeated the above offer in the statement of claim on condition that it was accepted without further litigation, and alleged that such offer was made to avoid litigation and to prevent the expense of taking the account. The statement of claim alleged that the debt of £213 18*s.* 5*d.* had been satisfied and extinguished by the composition; and that all that was due to the Defendants on account of the charge was £16. As to the interest,

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it was alleged that only six years' interest at £5 per cent. from the commencement of the action (the 3rd of March, 1879) was due. It was admitted that interest either at £5 or £4 per cent. was payable on the premiums which the Defendants had paid.

The claim was, for a declaration that there was due to the Defendants a sum less than the £170 which they offered to pay; for an account of what was due to the Defendants for principal and six years' interest, and that the policy might be redeemed by the Plaintiff on payment; also, if on taking the account it should be found that not more than £170 was due to the Defendants, for the costs of the suit.

The Defendants admitted the Plaintiff's right to redeem; and relied on the last proviso, above extracted, of the composition deed.

Hemming, Q.C., and *Mulligan*, for the Plaintiff:—

The sole question is, whether the policy moneys are a security for more of the Defendants' debt than the £16 covered by the estimated value of the policy in 1864; and whether the rest of the debt, namely, £213 8*s.* 5*d.*, was not extinguished in 1864 by the composition. We say it was.

The rule that if you proved for the whole or part of your debt, you abandoned your security for so much as you proved for, was a very old one, much older that the Act of 1861, though not embodied in a statute until the Act of 1869 (1).

Hardship will be suggested, as in *Ex parte King* (2), but your Lordship disposed of that suggestion; and we offer, as we are bound to do, to repay the premiums, with interest, as we say, at £4 per cent.

A legal right to sue for this debt was not created by the letter of the 28th of January, 1864.

By sect. 197 of the *Bankruptcy Act*, 1861, after the registration of a composition deed, the jurisdiction of the Court of Bankruptcy was let in, and the question is, what was the old rule in bankruptcy before 1869. In *Ex parte Downes* (3) a second mortgagee of the bankrupt, who in ignorance of the value of his security had

(1) Sect. 16, sub-sect. 4; Bankruptcy Rules, 1870, rr. 99, 100, 101.

(2) Law Rep. 20 Eq. 273.

(3) 1 Rose, 96.

abandoned it, and proved for his debt, was not allowed to be remitted to his pledge. *Ex parte Nunn* (1) shews what the old practice was. A creditor holding a security, and desiring to vote in the appointment of assignees, was allowed to have his security taken at a specified value, and if it turned out to be more valuable, the excess was carried to the estate. It is clear that the old rule was, that no one in bankruptcy could enforce his security in respect of any part of a debt for which he had proved: *Ex parte Greenwood* (2); and this rule by the Act of 1861 applies to composition deeds registered under that Act.

Sir *H. Jackson*, Q.C., and *Daniel Jones*, for the Defendants:—

The case of *Ex parte King* (3) was decided wholly upon the Act of 1869. The claim there was the claim by the trustee on behalf of the estate, *i.e.*, on behalf of the creditors. The Plaintiff's claim here is a claim for the benefit of the debtor's estate, and the contention is that in a case like this, where, in consequence of a contract with creditors, bankruptcy has been averted, this creditor is not to have the benefit of the contract.

By the terms of the composition deed nothing in the deed contained is to prevent us from enforcing or otherwise obtaining the full benefit and advantage of any charge or lien we might have, upon any estate or effects whatsoever; and we were to be entitled to the composition after allowing for and deducting the value of such charges or liens. We took the £16 and the 10*s.* composition, and now the debtor says he is entitled to all the rest.

The bankruptcy rule referred to was a rule made in order to secure equal division between the creditors. Composition has nothing to do with equal division. It is a contract that if somebody will give me 10*s.* in the pound I will not sue the debtor, and drive him into bankruptcy. The only effect of the release is to exempt the debtor from personal liability: *Green* v. *Wynn* (4); it does not amount to an extinguishment of the debt: *Bateson* v. *Gosling* (5).

(1) 1 Rose, 322.
(2) Buck, 323.
(3) Law Rep. 20 Eq. 273.
(4) Ibid. 4 Ch. 204.
(5) Law Rep. 7 C. P. 9.

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The debtor has escaped bankruptcy on the terms that the creditor should have the full value of his security. It is inequitable that the estate of the debtor himself should now get the value of the security except after payment of the debt in full.

This is not a case to which the rules of bankruptcy apply. It rests wholly in contract. The Act of 1861 gave to the debtor the means of escaping bankruptcy by making a composition, and the only question is, what is the effect of the deed; and the effect of the two clauses was this, "You need not realize your security at once; you may put a present value upon it and prove for the balance: but when the security has matured, you are not to lose the value of it, but may obtain the full benefit and advantage of it."

Hemming, in reply:—

The argument that this deed became by registration subject to all the existing rules in bankruptcy, has not been met.

If the contention of the other side be the correct one, that by the value of the charge was meant the value of the charge, not at the time, but at some future day when the security should have matured, the insertion of the last clause was a mere farce.

BACON, V.C.:—

I cannot help thinking that this case has been argued on principles which are not directly applicable. This is a case of composition; not of bankruptcy at all. The principles which govern the two classes of cases no doubt run very close, and sometimes do even run one into the other. But this is a case of composition. A failing debtor consults with his creditors, and for their common advantage an arrangement is come to which is perfectly just in itself, and which is accurately embodied in the stipulations of this deed. Upon the registration of this deed, subject to the composition being paid, the debtor is discharged from his obligations, remitted to all his former rights.

A question has been raised respecting the rules which apply to bankruptcies and those which apply to compositions; but in this instance the rule applicable to each is precisely the same. No creditor holding security can come and ask to participate in the

estate but upon terms; and in this instance the terms are distinctly stated. Beyond those stipulations the creditor is not entitled to go. The deed recites that the debtor had agreed to pay a composition of 10*s.* in the pound, and that a statutory majority of the creditors had agreed that the creditors should accept this composition, that the debtor should be released in manner thereinafter appearing, and that the creditors should execute the defeasible release thereinafter contained. I am aware that the release is called a defeasible release. But that only means defeasible if the payments of the composition be not duly made. Subject to that payment, the release is an absolute release; and from the day of its execution the debtor was free, and for ever discharged, from his debts. This being the frame of the deed, the present creditors, being secured to the amount of £16, want to obtain payment to the amount of £122 14*s.* 5*d.*, being not only £16, but the amount by which the composition fell short of payment in full of their debt. But they agreed to remain secured creditors for £16, and for no more. For the rest they agreed to accept, and they received, the composition. If this had been a bankruptcy, the trustee would have been entitled to the full benefit of the pledge. He might have redeemed the policy for the benefit of the estate, and then, supposing there had been no exaggeration or misrepresentation, would have had the same right as against the proceeds, as the creditors would have had if they had continued mortgagees. That proceeding would have been quite consistent with the principles of administration in bankruptcy. But then the deed contained the following clauses:—[His Lordship read the clauses set out above, and continued:—]

The first of these provisions was unnecessary, because there was nothing in the deed, and nothing in the law relating to such deeds, to prevent creditors from enforcing their charges or liens; and as to the provision that creditors should be entitled to the composition only after they had deducted the value of their securities—that is precisely what is being done in this action. The Defendants did come in; they said, "We hold security for £16; for £16 the policy is and shall remain our security; for the rest we go in with the other creditors." Considering that the creditor has availed himself of an arrangement with the debtor, that he has received

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a composition, and that he remains a secured creditor for £16, and for no more—now that the security has matured and become realized, inasmuch as the estate of the debtor has been long since released, it follows that this surplus must belong to the estate of the debtor. It is not as if the creditor had chosen to buy this policy for £16. He entered into a contract whereby, in consideration of the present payment of a composition on the rest of his debt, the policy was to remain a security for £16 and interest, and for no more.

To that sum he is entitled, and to all the premiums he has paid on the policy, with interest at £5 per cent.

There will be a declaration that there is now owing to the Defendants on their security the sum of £16, and that on payment of such sum with interest at £5 per cent. from the date of the composition deed, and of all premiums paid by the Defendants, with interest at £5 per cent. from the date of such payments respectively, and mortgagees' costs, the Plaintiff is entitled to redeem.

As to the costs of the action, I give no costs on either side.

Solicitors: *W. & J. Gibson; Nicol, Son, & Jones.*

V.-C. H.
1879
Dec. 20.

In re KING.
SEWELL *v.* KING.

[1879 K. 31.]

Assignment by Letter to Trustee of Marriage Settlement—Voluntary Settlement in favour of Children—Bequest by Will of Residue.

K., who in 1850 made a settlement for the benefit of himself, wife, and children of the marriage, being a widower in 1863 with four children, and about to contract a second marriage, wrote to one of the two trustees of the settlement a letter in which he said he was desirous of making a settlement upon his four children of six policies of assurance on his own life, the particulars of which he gave. Three of the policies were handed to the trustee, but the other three were deposited with the office as a collateral security and were to be subject thereto; but he undertook to pay off the amount claimed, so as to leave the policies free for the children. The trusts and provisions of the settlement were to be similar to those of the settlement of 1850, and he undertook to execute to the trustee written to and another trustee to be named an assignment of the six policies, to contain covenants to keep up the policies, and to pay the mortgage debt, and until the settlement should be executed he was to be bound by the agreement in the same manner as if the settlement were actually executed. In a letter written to the same trustee two days later enclosing the former letter, *K.* said, "The enclosed is the formal letter of assignment previous to a deed, and as binding."

No notice of the letters was ever given to the offices, no formal settlement of the policies was ever executed, and no notice was ever given to the other trustee of the settlement. The trustee written to died in 1871; and the settlement of 1850, the two letters, and the three policies were returned to *K.*, who by his will in 1875 gave the residue of his property to trustees for the benefit of all his eleven children :—.

Held, that what was done by *K.* was sufficient to make a complete assignment of the six policies for the benefit of his four children.

SPECIAL CASE under the *Judicature Act*, 1875, Order XXXIV.

By an indenture of settlement dated the 19th of June, 1850, *H. S. King* assigned to two trustees certain funds for the benefit of himself and his wife *Ellen*, and the children of the marriage.

Ellen King died in February, 1860, and *H. S. King* died in November, 1878. Under the trusts of the settlement the trust funds became divisible among the three sons and one daughter of the marriage, in equal shares.

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On the 19th of September, 1863, *H. S. King*, intending to contract a second marriage, and which was solemnized on the 22nd of September, 1863, wrote the following letter to Mr. *Blakeway*, one of the trustees of the settlement of 1850:—

"I am desirous of making a settlement upon my children of six policies of assurance upon my life, amounting together to £6000. The particulars of the policies are as follows"—[The numbers and the amounts of the policies were set forth, and the offices in which they had been effected.] "In order to carry my desire into effect, I send you herewith, as one of the trustees of the proposed settlement, the three policies in the *London Life*. The other three policies are at present mortgaged to the *Hand-in-Hand Insurance Office* as collateral security for a sum of £3000 advanced to me upon mortgage of my houses in *Pavilion Buildings, Brighton*, and the settlement must therefore be subject to the claim of the office upon these policies, but I undertake to pay off the amount of their claim from other sources so as to leave the policies free for the children. The names of my children are"—[The Christian names of the four children were mentioned.] "and the trusts, powers, and provisions of the settlement will be precisely similar (or as near as circumstances will allow) to those contained in my marriage settlement dated the 19th of June, 1850; and I hereby undertake and agree, in consideration of the natural love and affection which I bear to my said children, to execute to you and to another trustee to be named by me, but whom I have not yet decided upon, an assignment by way of settlement of the said six policies of assurance, such assignment to contain covenants by me to keep up the policies and to pay the said mortgage debt of £3000, and all such other clauses and provisions (if any) in addition to those hereinbefore referred to as you may be advised are necessary for the protection of the children's interests, and until the settlement is executed I am to be bound by this agreement in the same manner as if the settlement were actually executed.

(Signed) "*Henry S. King.*"

The letter of the 19th of September and the three policies in the *London Life Office* were sent to Mr. *Blakeway* with the fol-

lowing letter, dated the 21st of September, 1863 :—"The enclosed is the formal letter of assignment previous to a deed, and as binding. Please take charge of it, and I shall see you again upon it by-and-bye." (Signed) "*H. S. King.*"

No notice of the settlement effected or intended to be effected by the letter of the 19th of September was ever given to the two insurance offices during the life of *H. S. King*, and no formal settlement of the policies was ever executed. On the 19th of September, 1863, the co-trustee of Mr. *Blakeway* named in the settlement of 1850, was desirous of being discharged from the trusts, and in 1865 another trustee was appointed in his place, but no notice was given to him of the letter of the 19th of September, 1863.

Mr. *Blakeway* died in December, 1871, and the settlement of 1850 and the two letters of September, 1863, and the three *London Life* policies which had been in his possession, were, by his legal personal representatives, handed to *H. S. King*, in whose custody they remained until his death in 1878.

H. S. King, by his will made in November, 1875, gave to trustees the residue of his property upon trust for investment, and as to one half; and also as to the other half, after the death of his wife, to hold them for the benefit of his children equally until they attained the age of twenty-one years. The income of the one-half was to be paid to his wife for her life. The testator declared that his will was not to interfere in any way with his marriage or other settlement.

H. S. King left a widow and eleven children, including the four by the first marriage, and who had attained the age of twenty-one years. The seven children by the second marriage were infants. The moneys assured by the three policies in the *London Life Office* had been received by the executors. The mortgage on the three policies in the *Hand-in-Hand Office* was not discharged by the testator, after whose death the office received notice of the letter of the 19th of September, 1863, and in consequence of the notice they declined to release the policies from the charge in their favour, and the moneys assured had not been received. The question was, whether the letter of the 19th of September constituted a valid settlement of the several policies of insurance

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mentioned, or whether the moneys assured by them formed part of the testator's residuary estate.

Macnaghten appeared for the Plaintiffs, and

Hastings, Q.C., and *F. Brunning Maddison*, for the four children of the first marriage.

After the facts were stated, the Court did not require any argument, but

Romer, who appeared for the widow and children of the second marriage, was called upon:—

The other side would, I apprehend, support the letter as a voluntary declaration of trust, or as a complete settlement:—as an assignment of all the property included in it.

[HALL, V.C.:—Treat it as an assignment.]

It cannot, I submit, be held to be a declaration of trust, as where a settlor purports to settle property in trustees upon trust, it cannot be made out that he himself is a trustee of the property: *Milroy* v. *Lord* (1).

[HALL, V.C.:—Consider that the letter, *de bene esse*, is not a declaration of trust by the settlor or intended settlor constituting himself a trustee.]

Being relieved from that, the Plaintiff has to shew that the letter is a complete settlement in itself, and that he does not come here to have it made complete by any act upon the representations of the settlor. He did not contemplate, in writing the letter, that it was a transfer of the property, but he intended the property to be vested in more than one trustee when a deed of assignment was completed. Trustees were, however, never selected. The Plaintiff must shew that the settlor could not have revoked what he did. The only policies which he purported to deal with were the three in the *London Life Office*, and they were deposited with Mr. *Blakeway*. The other three mentioned in the letter were not dealt with in any way. No settlement, voluntary or otherwise, or agreement for a settlement, will be enforced as against the settlor, or persons claiming through or under him.

(1) 4 D. F. & J. 264.

unless it be shewn that everything has been done to complete the settlement. As to the three policies mortgaged, it is clear that the Court cannot possibly say that nothing remained to be done to complete the settlement. To make it complete, the legal personal representatives must be asked to take steps to get them into their hands.

There were no trustees appointed. Mr. *Blakeway* could not have sued or recovered the moneys secured by the policies. He must have called upon the representatives to assist him. As to the three mortgaged policies, two things remained to be done—to select trustees and to transfer the policies to them when selected, "so as to leave the policies free for the children." That was not done. The amount was not paid, and steps could not have been taken against the settlor to compel him to pay it, the whole thing being perfectly voluntary. The true construction to be put upon the letter is that it was a voluntary agreement for a settlement at a future time, and the settlor attempted and endeavoured, as far as he could, to bind himself to make a settlement at a future time, but no such undertaking can be enforced A mere undertaking is not binding. If anything remained to be done by the settlor to complete the settlement, it could not be enforced; but he contemplated an assignment, and it was never executed. The exact provisions of the settlement were not decided upon. He was not bound to keep up the policies. He might have said at any time, "This was a voluntary promise, and I do not choose to pay the premiums;" and he might have allowed them to lapse, and taken out other policies for himself. There was a *locus penitentiæ*. The Plaintiff must make out that it would be a full, final, and complete settlement as a whole, and the letter did not amount to an assignment, nor to a deed; a deed being necessary for the covenants to pay the premiums and to pay off the mortgage. They were necessary to complete the assignment of the policies. Writing to one of the proposed trustees does not turn a letter into an assignment, and there was no notice to the offices. The Plaintiff may rely upon the cases of *Richardson* v. *Richardson* (1) and *Morgan* v. *Malleson* (2), but can those decisions be sustained at the present time?

(1) Law Rep. 3 Eq. 686. (2) Law Rep. 10 Eq. 475.

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[HALL, V.C.:—Were not those cases of trust?]

Not absolutely perfected, but steps were taken to support them as such.

[HALL, V.C.:—I do not require you to go into those cases. The law was misapprehended by some Judges, but all was set right by the decision in *Milroy* v. *Lord* (1). There are not many cases which have any bearing upon this.

Hastings, Q.C.:—I should not have mentioned the cases just referred to.

HALL, V.C.:—There are the cases of *Fortescue* v. *Barnett* (2) and *Pearson* v. *Amicable Assurance Office* (3).]

There is the case of *Beech* v. *Keep* (4), though it is not on all fours with this. The cases come to this, that the Court, in order to declare a settlor bound, must see that he has done everything he could do to complete the transaction contemplated or intended to be effected, and *Milroy* v. *Lord* is an important decision upon the point of declaration of trust, and so is the case of *Searle* v. *Law* (5), where something remained to be done. Can it be said here that the matter was complete after the letter was written? Mr. *King* could have executed an assignment, given notice to the offices, and have entered into covenants to pay the premiums and the mortgage debt. There is the case of *Bridge* v. *Bridge* (6).

[HALL, V.C.:—That case was decided upon a wrong ground.]

Not for one thing. The settlor could not have passed the legal estate. Where a settlor purports to make a voluntary settlement, those who wish to enforce it must prove, whether the property be legal or equitable, that he has done everything to complete it, and it is clear here that the settlor had something more to do. There were covenants necessary in regard to the payments, and there was the very important matter of notice to the offices. Mr. *King* could have sold to the *Hand-in-Hand* office the equity of redemption in the three policies, and applied the proceeds of

(1) 4 D. F. & J. 264.
(2) 3 My. & K. 36.
(3) 27 Beav. 229.
(4) 18 Beav. 285.
(5) 15 Sim. 95.
(6) 16 Beav. 315.

sale to his own use. All the cases clearly prove one thing, that as to a voluntary settlement or agreement for one, if anything material has to be done to complete it, it cannot be enforced as against the settlor. This is not complete. It is not a settlement in itself, but merely in intention; part, and part only, was done by handing over three of the policies, and that was simply a deposit with a temporary holder. No part of the property ever came to his hands. The Court ought to hold that the matter was an imperfect and incomplete voluntary assignment or agreement for a settlement, and that all the children are entitled.

HALL, V.C.:—

This case has been very well argued by Mr. *Romer*. The question involved in it is one with which the Courts are so familiar that it is not necessary for me to go in detail through the numerous cases which might be referred to. The question which I have to determine is, whether upon the statement in this special case there was or was not an effectual settlement of the six policies, three of them being in mortgage to the *Hand-in-Hand Insurance Office*, and three of them not being in mortgage but handed over, as part of the transaction of the intended settlement, to Mr. *Blakeway*. Mr. *Romer* disputes its being an intended settlement at all; he says that it was not a settlement in itself, but an agreement at a future time to settle the policies. It seems to me, however, construing the two letters of the 19th and 21st of September together, that there was a clear intention to assign and settle the six policies. Mr. *King* was about to marry a second wife. He said he was desirous of making a settlement. [His Lordship read the letter of the 19th of September.] If the matter had remained there, it might well have been contended that, although the letter mentioned the policies, there was not an assignment of them as contemplated, but two days afterwards Mr. *King* sent the previous letter, which he called the "formal letter of assignment . . . and as binding," to Mr. *Blakeway*, and asked him to take charge of it. A deed was necessary because of the covenants. He, by the previous letter, undertook to execute a deed which should contain covenants to keep up the policies and to pay the mortgage debt. A deed of assignment of what? Of the six policies. I do

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not know what more is wanted. The settlor said that he meant to execute a deed, and that was consistent with his anxiety to make the settlement, and also with his having parted with the policies. The fact that the undertaking to execute a settlement was in part incomplete, does not, to my mind, shew that the other part was not complete. There was no intention of reserving to himself the power of retiring from that which was complete, so far as it could under the circumstances be completed, by handing over the three policies, and he could not hand over the other three, because they were in the hands of the mortgagee. But he bound himself to pay off the mortgage debt.

Mr. *King* not having executed the contemplated deed, the case is not one in which there can be an action for specific performance to enable the parties to get the benefit of the undertaking. It was pointed out that there was to be "another trustee to be named by me, but whom I have not yet decided upon;" but it is manifest that Mr. *King* meant that Mr. *Blakeway* should be a trustee until some other person should be associated with him. The assignment was to contain other clauses and provisions, but they were only to be such as Mr. *Blakeway* might be advised were necessary for the protection of the children's interests—formal clauses in reference to maintenance and education, but not any which would interfere with the substance of the settlement. The settlor said, "that until the settlement is executed I am to be bound by this agreement,"—the letter of the 19th of September,—and it was to be as operative "as if the settlement were actually executed." I am of opinion, therefore, that I cannot hold that the assignment is incomplete. With reference to the point argued, that no notice was given to the offices of the assignment, I think the answer to it is the case of *Fortescue* v. *Barnett* (1). It would be the business of the trustee to give the notice. There was, it is true, no power of attorney to enable any one to sue the offices, but it is difficult to see what could be the use of such a power in an assignment of policies upon the assignor's own life, as upon the determination of the life the power would be determined. In *Fortescue* v. *Barnett* there was not a power of attorney. This case is, I think, governed by the observations and the

(1) 3 My. & K. 36.

decision in *Fortescue* v. *Barnett* (1); and the decision of the Master of the Rolls in the case of *Pearson* v. *Amicable Assurance Office* (2). It is also within the strong and clear observations of Lord Justice *Knight Bruce* in the case of *Kekewich* v. *Manning* (3). In my opinion it would be absurd to say that when a person has intended and desired and striven to do everything necessary to make a settlement, the Court will not hold it to be a sufficient settlement; therefore, for these reasons, I cannot hold that what was done was not sufficient: on the contrary, I hold that there was a complete assignment of the policies to the trustee to whom the three policies were handed over, and that the two letters were a complete settlement of the policies mentioned therein. Three of the policies are subject to a mortgage, and in making a declaration that all the six policies were validly settled, it is not necessary for me to deal in any way with the question as to how the mortgage debt is to be borne or paid, as between the three policies and any other property comprised in the mortgage.

Solicitors: *Lawrence, Plews, & Baker; Eardley-Holt & Richardson.*

(1) 3 My. & K. 36. (2) 27 Beav. 229.
(3) 1 D. M. & G. 176.

FRY, J.
1880
Feb. 25.

REAL AND PERSONAL ADVANCE COMPANY *v.* McCARTHY.

[1878 R. 228.]

Practice—Withdrawal of Defence—Action for Recovery of Land—Costs—Rules of Court, 1875, *Order* XXIII., *r.* 1—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *ss.* 203, 204, 205.

One of the Defendants to an action for the recovery of land was allowed to withdraw his defence, after the action had been in the paper for trial but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving the Plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw.

And, the Defendant having offered in Chambers what the Court considered proper terms, the Plaintiffs were ordered to pay the costs of an adjournment of the summons into Court.

THIS action was brought to recover possession of a piece of land and a messuage erected thereon, and other premises connected therewith. The writ was issued on the 21st of September, 1878.

By their statement of claim the Plaintiffs alleged that by a deed dated the 5th of December, 1876, the Defendant *McCarthy* assigned the premises (which were leasehold) to one *Joseph Buckley*, for the residue of the term for which he held the same, and that by a deed dated the 28th of December, 1877, *Buckley* demised the premises to the Plaintiffs by way of mortgage for the residue of the term, less the last day thereof, with a proviso that there should be no sale or entry by the mortgagees except upon default by the mortgagor in payment of principal and interest or in observance of covenants, and that there had been such default by non-payment of principal and interest. The Plaintiffs also alleged that the Defendant *McCarthy* was in possession of the premises as *Buckley's* agent; that *Smith & Co.*, also Defendants, were let into possession thereof without the knowledge or consent of either the Plaintiffs or *Buckley*, and that both the Defendants were then in possession and had wrongfully retained the same. The Plaintiffs claimed possession of the premises and mesne profits.

Smith & Co., on the 13th of December, 1878, delivered a state-

ment of defence, by which they only said that they were in possession of the premises by themselves or their tenant, and that they did not admit any of the allegations contained in the statement of claim.

McCarthy also delivered a statement of defence.

On the 6th of November, 1879, the action (which was originally commenced in the Queen's Bench Division, but had been transferred to the Chancery Division and assigned to Vice-Chancellor *Bacon*, and afterwards transferred to Mr. Justice *Fry* for trial) was in the paper of Mr. Justice *Fry* for trial, together with another action of *McCarthy* v. *Buckley*, to which the Plaintiff company were Defendants, but, on the application of *McCarthy*, whose time for delivering a reply in the action of *McCarthy* v. *Buckley* had not expired, and who desired to deliver a special reply, it was, with the consent of counsel for all parties, ordered that the trial of both actions should be postponed pending the delivery of *McCarthy's* reply, on the terms of his paying the costs of the day to the Plaintiff company and to *Smith & Co.*, and also to the other Defendants in *McCarthy* v. *Buckley*.

On the 7th of January, 1880, *Smith & Co.* took out a summons in the Chambers of Vice-Chancellor *Bacon* that they might be at liberty to withdraw their defence to the company's action on such terms as to the Court should seem fit, on the ground that they had quitted possession of the premises which the Plaintiff company sought to recover. They had occupied the premises temporarily during the rebuilding of their own, which had been burnt down. On the hearing of the summons by the Chief Clerk, *Smith & Co.* offered to pay into Court as for mesne profits the balance of rent due from them for their occupation of the premises, and to pay to the Plaintiffs all the extra costs occasioned by their having delivered a statement of defence. The Chief Clerk gave leave to withdraw the statement of defence on *Smith & Co.* paying the balance due from them for occupation rent into Court, and paying to the Plaintiff company the costs occasioned by the defence and the summons, and ordered that thereupon all further proceedings against *Smith & Co.* should be stayed.

On the application of the company the summons was adjourned into Court, and afterwards, on the suggestion of Vice-Chancellor

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Bacon, the hearing was adjourned to come on before Mr. Justice *Fry* with the trial of the action.

North, Q.C., and *Speed*, for *Smith & Co.*

Cookson, Q.C., and *Creed*, for the Plaintiffs:—

Smith & Co. ought to be made liable for all the costs, and the order of the Chief Clerk will not have that effect. If *McCarthy* should be unable to pay the costs, the Plaintiffs, though they succeed, will lose the costs of the action altogether. And, indeed, if one Defendant can withdraw in this way, the other may do the same thing. If the trial had been concluded in November, we should, if we had succeeded, have obtained a judgment for the costs of the action against *Smith & Co.* Why should they, after defending the action as long as it suited their own purposes to do so, be allowed now to withdraw, and escape liability for the costs? Order XXIII., rule 1, is a generalization of the provisions of sects. 203–205 of the *Common Law Procedure Act*, 1852 (1).

Those sections evidently contemplate the giving of a notice before the trial of the action, and the same construction should be given to rule 1 of Order XXIII. At any rate, if a defendant

(1) Section 203 provides that "A sole defendant or all the defendants in ejectment shall be at liberty to confess the action as to the whole or part of the property, by giving to such claimant a notice headed in the Court and cause, and signed by the defendant or defendants, such signature to be attested by his or their attorney; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession and costs."

Sect. 204: "In case one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the claimant's title to such portion, he may give a like notice to the claimant; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue."

Sect. 205: "In case one of several defendants in ejectment, who defends separately in respect of property for which other defendants also defend, shall be desirous of confessing the claimant's title, he may give a like notice thereof; and thereupon the claimant shall be entitled to and may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution."

allows the case to proceed to trial, he ought to be made liable for all the costs of the action: *Johnson* v. *Mills* (1). The summons should have stated the terms on which the Defendants proposed to withdraw.

FRY, J.:—

It certainly seems to me that it would have been better if the summons had contained the terms which the Defendants proposed to offer. But that is not a matter of substance. [His Lordship read rule 1 of Order XXIII., and stated the facts and the terms proposed in Chambers, and continued:—] It appears to me that those were perfectly reasonable terms. By giving up possession of the property and paying the mesne profits, the Defendants were really giving the Plaintiffs in substance everything to which they were entitled. And, with respect to costs, it appears to me that all to which the Plaintiffs were in justice entitled was the costs occasioned by the defence. Section 205 of the *Common Law Procedure Act*, 1852, dealt with the very case now before me, and it provided that if one of several defendants in ejectment gave notice confessing the plaintiff's title, the plaintiff should be entitled to sign judgment for the costs occasioned by that defendant's defence. I can see no reason why that is not an ample measure of indemnity to the Plaintiffs in the present case. It is said that the amount of the mesne profits was not ascertained till to-day, and in one sense that may be true. But the Chief Clerk's note shews that there was no real dispute between the parties about that. In my opinion the order of the Chief Clerk was quite right, and I fix the amount to be paid for mesne profits at £25. The adjournment into Court was wholly unnecessary, and the Plaintiffs must pay the costs of it, and also the Defendants *Smith & Co.'s* costs of the action subsequent to the hearing of the summons by the Chief Clerk, so far (if at all) as they have been increased by the proceedings not having been stayed then.

Solicitor for *Smith & Co.*: *C. Sawbridge.*
Solicitors for Plaintiffs: *Billing & Kent.*

(1) Law Rep. 3 C. P. 22.

FRY, J.

1880

Feb. 23;
March 11.

WATSON *v.* GRAY.

[1879 W. 83.]

Party-Wall—Tenants in Common—Exclusion of one Tenant by the other—Remedy.

The meaning of the term "party-wall" defined.

The most ordinary and the primary meaning of the term "party-wall" is a wall of which the two adjoining owners are tenants in common.

If one of the two tenants in common of such a wall excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction.

The owners in fee of two adjoining houses derived title to them from a common predecessor in title. In the conveyances from that predecessor to the two owners respectively, was contained a declaration that the wall which divided the yards at the back of the two houses should be and remain a party-wall:—

Held, that the two owners were tenants in common of the wall.

THIS action was brought to restrain the commission of certain alleged acts of trespass by the Defendant, and for damages.

The Plaintiff and the Defendant were the owners in fee of adjoining houses, numbered respectively 9 and 7, in a row of houses, called *Queen's Terrace*, in *Middlesborough*. *Queen's Terrace* faced to the east, and the Defendant's house was situate to the north of the Plaintiff's. At the rear of each of the houses was a yard, the yards being separated from each other by a wall 4½ inches thick.

The Plaintiff's house and premises were by a deed dated the 15th of September, 1855, conveyed by *Joseph Pease* and others in fee to *Jane Lyons*, who was a predecessor in title of the Plaintiff. The deed contained the following clause: "It is hereby agreed and declared by and between the said parties hereto that the north and south gables and walls of the said messuage or dwelling-house and hereditaments hereby conveyed shall be and remain party walls, and that the eastern and western walls and the pallisades in front of the said messuage or dwelling-house shall belong exclusively to the said *Jane Lyons*, her heirs and assigns."

The Defendant's house and premises were conveyed to him in

fee by the same persons by a deed dated the 27th of December, 1864, which contained a similar declaration as to the north and south walls thereof.

The principal act of trespass complained of by the Plaintiff arose in this way. The Plaintiff had recently commenced erecting in his back yard a shed. This shed immediately adjoined the wall separating his yard from the Defendant's yard, and the Plaintiff had, without the Defendant's permission, built on the top of that wall a new piece of wall of a triangular shape about 4 ft. 6 in. in length at the bottom, and about 3 ft. 4 in. in height. In thickness it corresponded with the thickness of the old wall. The new piece of wall was intended to support the roof of the shed. The Defendant had knocked down the new piece of the wall. The Plaintiff claimed damages for the removal of the new piece of wall, and an injunction to restrain the Defendant from interfering with the rebuilding of it.

North, Q.C., and *Everitt*, for the Plaintiff:—

No doubt, in an ordinary case, a party-wall belongs to the adjoining owners as tenants in common: *Stedman* v. *Smith* (1); *Cubitt* v. *Porter* (2). But the true construction of the conveyance under which the Plaintiff claims is that the wall in question is the sole property of the Plaintiff, subject to certain easements in favour of the Defendant. When such a wall was built by the original owner of both the properties, there is no presumption that the adjoining owners are tenants in common of it. On the contrary, the presumption is that the original owner conveyed the whole of it by the first conveyance. The Defendant has no property in the wall. The mere use of a wall as a party-wall does not make it a party-wall; it may be a party-wall for the purpose of marking the separation between the adjoining properties, without being a party-wall throughout the whole of its height: *Weston* v. *Arnold* (3). If the Plaintiff is the owner of only a moiety of the wall, divided into moieties longitudinally, he has a right to pare away his moiety: *Cubitt* v. *Porter* (4); *Sheffield Improved Industrial and Provident Society* v. *Jarvis*,

(1) 8 E. & B. 1.
(2) 8 B. & C. 257.
(3) Law Rep. 8 Ch. 1084.
(4) 8 B. & C. 257, 264.

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before Vice-Chancellor *Malins*, on the 21st of November, 1871, and before the Lords Justices on the 28th of February, 1872.

J. E. Palmer, for the Defendant:—

The suggested construction of the conveyance to the Plaintiff is a forced one. The presumption of law is that adjoining owners are tenants in common of a wall which divides their properties: *Wiltshire* v. *Sidford* (1); *Cubitt* v. *Porter* (2); *Standard Bank of British South America* v. *Stokes* (3); *Woodfall's* Landlord and Tenant (4); *Hunt* on Boundaries (5). The Plaintiff has attempted to exclude the Defendant from the wall, and the Defendant was therefore justified in removing the obstruction: *Cubitt* v. *Porter*; *Wiltshire* v. *Sidford*.

North, in reply:—

The presumption of tenancy in common does not exist in a case where the owner of two adjoining tenements conveys one of them away; unless there is an express reservation the grant must be construed most strongly against the grantor: *Pyer* v. *Carter* (6); *Suffield* v. *Brown* (7); *Wheeldon* v. *Burrows* (8). *Standard Bank of British South America* v. *Stokes* is distinguishable.

March 11. FRY, J., after stating the facts, and observing that the conveyance to the Plaintiff would, no doubt, include the walls of the house, if it had not contained the proviso that the north and south walls should be party-walls, stated that proviso, and continued:—

What is the meaning of the term "party-wall," as there used? The words appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses.

They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire* v. *Sidford* and *Cubitt* v. *Porter*. I think that the judgments in those cases shew that

(1) 1 Man. & Ry. 404.
(2) 8 B. & C. 257, 265.
(3) 9 Ch. D. 68.
(4) 11th Ed. p. 575.
(5) 2nd Ed. p. 114.
(6) 1 H. & N. 916.
(7) 4 D. J. & S. 185.
(8) 12 Ch. D. 31.

that is the most common and the primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts* v. *Hawkins* (1). Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the Building Acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety.

In whichever of these senses the term is used some difficulty arises. In the case of a longitudinal division between the two neighbours, each of them, as was said in *Cubitt* v. *Porter* (2), has a right to pare away one moiety of the wall, and if this was done the moiety of the other owner might be of very little use to him. Again, if the wall belongs to the adjoining owners as tenants in common, it may become the subject of a partition, and then exactly the same difficulty would arise. To meet this difficulty the fourth meaning of the term "party-wall" was suggested by the learned author of the note to *Wiltshire* v. *Sidford* (3).

In the present case I have come to the conclusion that the wall must be considered as belonging to the Plaintiff and the Defendant as tenants in common, first, because the cases shew that this is the most ordinary meaning of the words, and, secondly, because in the conveyance of the 15th of September, 1855, a party-wall is contrasted with a wall belonging exclusively to one owner.

Then the question arises whether what the Plaintiff has done is a violation of the Defendant's rights. This, it must be remembered, is not the same question as whether an action of trespass could be maintained by the Defendant against the Plaintiff. I have come to the conclusion that the Plaintiff was not justified in doing what he did. In *Cubitt* v. *Porter*, *Bayley*, J., said (4): "One tenant in common has upon that which is the subject-matter of the tenancy in common laid bricks and heightened the wall. If that be done further than it ought to have been done, what is the

(1) 5 Taunt. 20.
(2) 8 B. & C. 257, 264.
(3) 1 Man. & Ry. 408.
(4) 8 B. & C. 265.

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remedy of the other party? He may remove it. That is the only remedy he can have." That is the precise remedy to which the Defendant has had recourse in the present case. The case of *Stedman* v. *Smith* (1) is also material on this part of the present case. There, as the head-note states, "the plaintiff and the defendant occupied adjacent plots of ground divided by a wall of which they were tenants in common. There was a shed on the defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. The defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contiguous to the wall, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall, and he set a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him." On these facts it was held that a jury might find an actual ouster by the defendant of the plaintiff from the possession of the wall which would constitute an actionable trespass. In the course of the argument *Crompton*, J., said, "You certainly had no longer the use of the same wall; you could not put flower-pots on it, for instance. Suppose he had covered it with broken glass, so as to prevent your passing along it, as you were entitled to do." And in his judgment he said, "The plaintiff is excluded from the top of the wall; he might have wished to train fruit trees there, or to amuse himself by running along the top of the wall." Just so in the present case, the Plaintiff has excluded the Defendant from the use of the top of the wall. I hold, therefore, the Plaintiff is not entitled to any damages in respect of the throwing down of the wall, and that the injunction asked for cannot be granted.

Solicitor for Plaintiff: *E. Peacopp*, agent for *H. Watson, Middlesborough.*

Solicitors for Defendant: *Hope & Co.*, agents for *John Trotter, Stockton-on-Tees.*

(1) 8 E. & B. 1.

HARDING *v.* WILLIAMS.

FRY, J.
1880
April 6.

[1878 H. 427.]

Evidence—Admissibility—Copies of Entries in Bankers' Books—Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11), *ss.* 3, 10.

The effect of sect. 3 of the *Bankers' Books Evidence Act*, 1879, is to make copies of entries in the books of a banker admissible evidence against any one:—

Therefore, copies of entries in the books of the bankers of a defendant are evidence against the plaintiff.

THE Plaintiff claimed the delivery up by the Defendant of a promissory note for £500, and the reassignment of a policy of insurance, on the ground that he had repaid to the Defendant, with interest, the sum of £500, as security for which the promissory note had been given and the policy assigned to the Defendant.

The Defendant alleged that the £500, with interest, still remained due to him.

Cookson, Q.C., and *Rigby*, for the Plaintiff.

North, Q.C., and *Marcy*, for the Defendant, tendered as evidence in support of his case an affidavit made by the manager of the *Worcester* branch of the *National Provincial Bank of England*, with which the Defendant kept a banking account. This affidavit set forth some copies of entries in the books of the bank, verified by an affidavit of the manager of the bank, as required by the *Bankers' Books Evidence Act*, 1879 (1).

(1) The *Bankers' Books Evidence Act*, 1876 (39 & 40 Vict. c. 48), contained this recital in the preamble:—

"Whereas serious inconvenience has been occasioned to bankers, and also to the public, by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings; and whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books."

Sect. 3. "From and after the commencement of this Act the entries in ledgers, day books, cash books, and other account books of any bank shall be admissible in all legal proceedings as *primâ facie* evidence of the matters, transactions, and accounts recorded therein, on proof being given by the affidavit in writing of one of the partners, managers, or officers of such bank, or by other evidence, that such ledgers, day books, cash books, or other account

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Cookson, Q.C., objected that the copies were not admissible evidence against the Plaintiff. The originals were not evidence against him, and it could not have been intended to make copies evidence when the originals would not have been admissible. Sect. 3 of the *Bankers' Books Evidence Act*, 1876, made the original entries in bankers' books admissible evidence; but that

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books are or have been the ordinary books of such bank, and that the said entries have been made in the usual and ordinary course of business, and that such books are in, or come immediately from, the custody or control of such bank. Nothing in this clause contained shall apply to any legal proceeding to which any bank whose ledgers, day books, cash books, and other account books may be required to be produced in evidence shall be a party."

Sect. 4. "Copies of all entries in any ledgers, day books, cash books, or other account books used by any such bank may be proved in all legal proceedings as evidence of such entries without production of the originals, by means of the affidavit of a person who has examined the same, stating the fact of the said examination, and that the copies sought to be put in evidence are correct."

This Act was repealed by the *Bankers' Books Evidence Act*, 1879 (42 & 43 Vict. c. 11), which contained (*inter alia*) the following provisions:—

Sect. 3. "Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded."

Sect. 4. "A copy of an entry in a banker's book shall not be received in evidence under this Act, unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

"Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits."

Sect. 5. "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry, and is correct.

"Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits."

Sect. 6. "A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause."

Sect. 10 provides that "the expression 'legal proceeding' means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration."

Act was repealed by the Act of 1879, the provisions of which were substituted for it.

North, Q.C., and *Marcy*, for the Defendant, were not heard.

FRY, J.:—

The objection is, in my opinion, entirely untenable. Mr. *Cookson* says that sect. 3 applies only to legal proceedings in which the originals would be admissible as evidence. But the language of the section is plain, and I have no right to alter the plain meaning of it. Sect. 10 gives a definition of the expression "legal proceedings," and by sects. 4 and 5 certain conditions are required to be performed before the evidence can be admitted. Moreover, the Act repeals the previous Act of 1876, the preamble of which shewed that it had two objects in view: to render the entries in bankers' books admissible in evidence, and to enable copies of the entries to be used instead of producing the originals. The reasons mentioned in the preamble of that Act are of equal force now, and the words of sect. 3 of the Act of 1879 are wide enough to make the copies evidence against any one.

I am of opinion, therefore, that the objection cannot be sustained, and I admit the evidence.

Solicitors for Plaintiff: *Hare & Fell*, agents for *Charles Heywood & Son, Manchester.*

Solicitors for Defendant: *Tucker & Lake*, agents for *R. H. Whitcombe, Bewdley.*

C. A.
1879
Dec. 17.

PIERCY *v.* YOUNG.

[1879 P. 217.]

Partnership Articles—Agreement to refer to Arbitration—Revocation—Question whether Matters in dispute are within the Agreement—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.

Articles of partnership between the Plaintiff and other persons for performing a contract contained an agreement that any dispute between the partners should be settled by arbitration, but there was no agreement that the submission to arbitration might be made a rule of Court. One of the partners became a liquidating debtor, and the Defendant was appointed his trustee, and he elected to carry on the contract. The Defendant claimed to have purchased the shares of the Plaintiff and the other partners in the undertaking. The Plaintiff brought an action against the Defendant asking for an account of the partnership dealings. The main questions at issue were whether the shares of the other partners were purchased on behalf of the Plaintiff and Defendant or of the Defendant alone, and whether the Defendant had purchased the share of the Plaintiff as well as of the other partners.

The Defendant moved for an order under the *Common Law Procedure Act*, s. 11, staying all proceedings in the action, and referring the matters in question to arbitration, but before the motion was heard the Plaintiff revoked the agreement for arbitration:—

Held, first, that although a particular submission to arbitration might be revoked, a general agreement to refer to arbitration could not be revoked by one of the parties; but,

Secondly, that the matters in dispute were not within the agreement for arbitration, and the motion was accordingly refused.

The question whether the matters in dispute are within the agreement for arbitration is one which the Court will decide, and will not leave to the arbitrator.

Willesford v. *Watson* (1) distinguished.

Whether the trustee in the liquidation was a party entitled to make the application within the 11th section of the *Common Law Procedure Act*, *quære*.

THIS was an appeal from an order of Mr. Justice *Stephen*, sitting as Vacation Judge.

By an agreement dated the 15th of May, 1873, and made between *Thomas Docwra*, *Gaetano Semenza*, and *G. W. Morris*, a

(1) Law Rep. 8 Ch. 473.

S C on appeal 4 C.P.D. 47 [illegible]

partnership was agreed upon between *Docwra*, *Semenza*, *Morris*, and a fourth person to be nominated by *Semenza*, for the purpose of carrying out a contract which had been entered into between *Semenza* and the *Royal Sardinian Railway Company* for the construction of a railway in *Sardinia*, called in the pleadings "Line D."

The effect of the agreement was that *Docwra*, *Morris*, and *Semenza's* nominee were to execute the works according to the contract with the company, and that *Semenza* was to supply the money for the expenses, not exceeding 5,325,000 Italian lire, which he expected to receive from the company, and that on the completion of the contract the difference between that sum and the expenditure should be equally divided between the four partners.

The agreement contained the following article (Art. 23): "Any differences or disputes which may arise between the partners shall be settled by an arbitrator to be agreed upon between the partners, and his decision shall be final and binding upon all parties."

There was no clause in the agreement that the submission to arbitration might be made a rule of Court.

By a memorandum of even date *Semenza* nominated the Plaintiff *B. Piercy* to be the fourth partner in the adventure.

For a time *Semenza* supplied funds to his co-partners to carry on the works, but in November, 1873, he filed a petition for liquidation under the *Bankruptcy Act*, and the Defendant *J. Young* was appointed trustee in the liquidation.

The Defendant, with the consent of the creditors and the company, elected to adopt the contract, and the railway was eventually completed in December, 1874, with the assistance of a sub-partnership between *Docwra*, *Morris*, and the Plaintiff and the *Bank of Cagliari* and a person named *Calvi*, which was rendered necessary, as the Plaintiff alleged, by the default of the Defendant in supplying the necessary funds.

The Plaintiff alleged that in February, 1878, the Defendant purchased, on behalf of himself and the Plaintiff, *Docwra's* share of the partnership for £13,000, and that in April, 1878, he also purchased, on behalf of himself and the Plaintiff, *Morris's* share in the partnership for £7228; and that the Defendant had also

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purchased, on behalf of himself and the Plaintiff, all the interest of the *Bank of Cagliari* and *Calvi* in the adventure.

In July, 1879, the Plaintiff brought the present action in the Rolls Court against *Young* for an account of the partnership dealings, and asking that in taking the accounts the Defendant might be charged with damages for breaches of the partnership agreement committed by him and by *Semenza*.

The Defendant, in his statement of defence, alleged that he had purchased the respective interests of *Docwra*, *Morris*, the *Bank of Cagliari*, and *Calvi* on the account of *Semenza's* estate, and not for the benefit of the partnership; and he also asserted that the Plaintiff had stated and settled an account with the Defendant in respect of the Plaintiff's share of profits arising out of the said partnership at the sum of £5000; and that the Plaintiff, for good consideration in that behalf, agreed with the Defendant to accept the sum of £5000 as the agreed amount of his share of the profits.

The statements in which these allegations by the Plaintiff and Defendant were made are more fully set out in the judgment of the Master of the Rolls. The Defendant also claimed by way of counter-claim the sum of £8224 for money advanced by the Defendant to the Plaintiff, and interest.

On the 22nd of August, 1879, the Defendant gave notice of motion that all proceedings in the action might be stayed, and all questions in the action might be referred to arbitration under the provisions of the 57th and 59th sections of the *Judicature Act*, 1873, and the 11th section of the *Common Law Procedure Act*, 1854.

Before the motion was heard, the Plaintiff served notice on the Defendant that he revoked the submission to arbitration contained in the agreement of the 15th of May, 1873.

The motion was heard by Mr. Justice *Stephen*, the Vacation Judge, on the 4th of September, when his Lordship granted the application.

The Plaintiff appealed from this order.

Roxburgh, Q.C., *Chitty*, Q.C., and *Romer*, for the Appellant:—

The order is erroneous on several grounds. In the first place, the Defendant *Young* is not a party to the agreement, nor "a person claiming through or under" any party, within the 11th section

of the *Common Law Procedure Act;* nor is he a partner within the meaning of the arbitration clause: *Pennell* v. *Walker* (1). In the second place, the matters in dispute in the action are not within the arbitration clause. They relate to the purchase of shares from the Plaintiff and the other partners by the Defendant, and not to any question which arose in the conduct of the partnership. It is true that the words of the clause are very general, but they must have some limitation, and the only reasonable limit is that they must refer to the matters mentioned in the previous articles. In the third place, the 11th section of the *Common Law Procedure Act*, under which the order was made, enacts that the Judge must be satisfied that the Defendant was at the time of the bringing of such action ready and willing to concur in all acts necessary for causing the matter to be referred to arbitration. The Defendant has produced no evidence of this, nor is it the fact that he was ready and willing. In the fourth place, the submission to arbitration has been revoked by the Plaintiff. This can always be done before the award where there has been no agreement to make the submission a rule of Court: *Mills* v. *Bayley* (2); *Re Rouse and Meier* (3); *Thomson* v. *Anderson* (4); *Randell* v. *Thompson* (5).

JESSEL, M.R.:—

With respect to the last point, we are all clearly of opinion that a general agreement to refer matters in dispute to arbitration cannot be revoked. The authorities cited have no application. They all relate to cases in which the reference had been actually made to a particular arbitrator (6). We also do not desire to hear counsel on the question whether the Defendant is a party who can make this application within the meaning of the *Common Law Procedure Act.*

(1) 26 L. J. (C.P.) 9.
(2) 2 H. & C. 36.
(3) Law Rep. 6 C. P. 212.
(4) Ibid. 9 Eq. 523.
(5) 1 Q. B. D. 748.
(6) In a similar case of *Christie* v. *Noble*, before *Jessel*, M.R., on the 16th of April, 1880, His Lordship followed the above decision, considering himself bound by it. His Lordship observed that, although a particular submission to arbitration might be revoked, a partner could no more revoke a general agreement to refer than he could revoke any other contract in the partnership articles. See also *Moffat* v. *Cornelius*, 26 W. R. 914.

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Davey, Q.C., and *Pollard* (*Benjamin*, Q.C., with them), for the Defendant:—

The matters now in dispute were matters arising out of the conduct of the partnership, and come fairly within the agreement for arbitration. The question, in fact, is whether certain moneys paid by the partners to the Defendant are part of the partnership assets, and ought to be brought into account by him. At any rate, the question whether the matters in dispute are within the agreement to refer is a matter for the arbitrator to decide: *Willesford* v. *Watson* (1). With respect to the other point, namely, that the Court ought to be satisfied that the Defendant was ready and willing to refer the question to arbitration, that is a point which ought to have been taken before Mr. Justice *Stephen*, who might then have called for evidence upon the subject. It is now too late to take the objection: and if it is pressed, we ask for an opportunity of giving further evidence.

JESSEL, M.R.:—

This is an appeal from the decision of Mr. Justice *Stephen*, sitting as Vacation Judge. Although I differ from that learned Judge on one point, I must say it is a satisfaction to me to find that, as he states himself, he had very considerable doubt about the matter during the argument, and he decided it eventually with very great hesitation. So that, although we differ from him, we differ from him only to a slight extent. There are two points on which we called upon the Defendant's counsel, independently of several others which were argued on the part of the Appellants. One point is this, that the matter in question—that is, the chief issue in the suit—was not one of the matters intended or agreed to be referred to arbitration. There was a second, and a very minor, point as to whether or not the Court ought to have been satisfied that the Defendant was ready to refer to arbitration at the time the action was commenced.

Now, as regards the first point, there is, no doubt, considerable difficulty in saying what the words do include. It is one of the shortest arbitration clauses, if not the shortest, I ever saw. It provides that "Any differences or disputes which may arise

(1) Law Rep. 8 Ch. 473.

between the partners shall be settled by an arbitrator to be agreed upon between the partners." Then it says that his decision is to be final and binding, and that is all. It was urged on the part of the Appellant that there must be some limit to it. It cannot be read literally as meaning all differences or disputes which might arise between the partners. If there were a quarrel about a horse-race, which had no connection with the partnership business, of course it could not mean that; and therefore the real question is, what the limit is. It is not an Act of Parliament, and therefore I am not compelled to say what it means. It is sufficient if I say that it does not, in my opinion, include the subject-matters in this action.

Let us see what the real contest is between the parties. The real contest is not a question of taking partnership accounts at all. The Defendant says to the Plaintiff, "You have ceased to be a partner, and you have sold me your share, and have nothing whatever to do with these partnership transactions any longer." We have had one advantage which Mr. Justice *Stephen* did not possess, and that is, since the case has been before him a statement of defence has been put in by the Defendant, and there is not the slightest doubt what his contention is. It is stated in paragraph 12, "The Plaintiff for good consideration in that behalf promised and agreed with the Defendant to accept the sum of £5000 as the agreed amount of his share of the said profits, and promised and agreed with and to the Defendant, the said *Thomas Docwra*, that if the said *T. Docwra* would agree to and would accept from the Defendant and the Defendant would pay to him the sum of £5000 as for his one-fourth share of and in the said profits, he, the Plaintiff, would agree to and would accept the sum of £5000 as and for his share of and in the said profits, and such agreement has been acted upon, and the Defendant has, with the approval of the said committee of creditors and of the Plaintiff as a member thereof, paid the said sum of £5000 to the said *T. Docwra* as and for his said share of and in the said profits, and he has, with the knowledge and approval of the Plaintiff as a partner, duly assigned the same to the Defendant." Then the 13th paragraph is this: "The Defendant admits that the said Plaintiff is entitled to be paid the said £5000 as his agreed share of profits." So that there

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is no question about it. The chief issue between them is whether the partnership has been put an end to by the Plaintiff having sold his share for £5000.

But there is another question between them, and the other question is this—and I prefer to take it from the original statement of claim: In the 11th paragraph it is stated, "On or about the 1st day of February, 1878, the said *Thomas Docwra* sold to the Defendant, and the Defendant purchased from him on account of the Plaintiff and Defendant, with the consent of the Plaintiff all his the said *Thomas Docwra's* share of profits under the said agreement of the 15th of May, 1873, and a sub-agreement of partnership with the *Bank of Cagliari* and Signor *Calvi* (under which the said bank and Signor *Calvi* acquired an interest in the profits of the said contract), and all his the said *T. Docwra's* claim for money advanced and interest, and generally all his claims against the partnership of Mr. *Semenza* and his estate in respect of the said railway for £13,000, £5000 whereof was to be paid on signing the agreement for such sale, £5000 on the 1st of March, 1878, and £3000 on the 31st of July, 1879. The first two of the said sums have been paid." Then the next paragraph states: "On the 1st day of April, 1878, the said *George William Morris*," another partner, "sold all his like interest and claim to the Defendant on account of the Plaintiff and the Defendant, with the Plaintiff's consent, for the sum of £7228, whereof £3000 was to be paid on executing the agreement for such sale, £2114 on the 1st day of April, 1879, and £2114 on or before the 1st day of October, 1879. The first two of the last-mentioned sums have been paid." Then the 13th paragraph states: "The share hereinbefore mentioned as having been acquired by the *Bank of Cagliari* and Signor *Calvi* in the profits of the said contract has since been purchased by the Defendant, with the Plaintiff's consent, on their joint account." Then it goes on in the 14th paragraph to state that all that has been paid out of the property and funds of the partnership.

As I read those allegations it is simply this: "That you, the Defendant, bought with my consent certain shares of several partners on our joint account as regards the purchase in February, not on account of the partnership, but on account of you and me"

—He says so in so many words—"and as regards the purchase in April on account of you and me, and as regards the subsequent purchase of the sub-partnership also on account of us two." I am not saying whether it is true or untrue, but I am saying that that is the issue. Well, that being so, he claims the benefit of those purchases. It is quite true that he says that a part of the purchase-money has been paid out of the partnership assets, not the whole, and that might give him another claim, because under our present system of pleading the statement of fact might entitle him to another equity. That is, if he failed in making out an agreement, he might still prove the payment out of the partnership assets and be entitled to the benefit of following those assets, and so acquiring the shares in another way. But it is a totally different thing where the purchase is only partly paid for out of the partnership assets, and not totally, his claim would be of a different kind and of a different amount, and it is not therefore right to say that his claim is confined to a claim as to his rights by reason of the application of the assets of the partnership. He has a distinct claim under the agreement independently of that.

Looking at those issues, can they be described as disputes between the partners? I am assuming for this purpose, although I am not satisfied of the fact, that the Plaintiff and Defendant were partners. I say I am assuming it, because the Plaintiff has so framed the statement of claim that it would be very difficult for him on the present occasion to deny it, but whether it is so or not I do not know. *Primâ facie* they would not be partners, but I am told there is evidence to shew that the Defendant, who is in fact the trustee in liquidation of the partnership, did in fact enter into a partnership arrangement. If so, of course he would be a partner; if not, he would not be; but still the claim is framed in such a way that as against the present Appellant I think I am entitled to assume that the Defendant is to be treated as a partner.

Now, that being so, can we say that those disputes are disputes within the fair meaning of the words relating to the carrying on of the partnership business. The first question is a question not of carrying on the partnership business, but it is whether the partnership has been dissolved and the Plaintiff has sold his share.

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The second set of questions—there are three of them—are whether certain other shares were purchased, not for the benefit of the partnership, but for the benefit of the Plaintiff and the Defendant. It does not appear to me, within any fair meaning of the words, that any such transaction as this can be said to have been within the contemplation of the parties when this clause was framed. That being so, I think the motion ought not to have been granted, and, indeed, if the issues are decided one way there will be nothing to refer, for the Plaintiff will get his £5000 and pay the costs of the suit. If they are decided the other way, there will be something to refer, namely, the taking of the accounts of the partnership. Those, of course, can be sent to a referee without the slightest difficulty. The great object of these clauses is to prevent the delay and expense of litigation, but we must not forget in deciding upon them that they do deprive one of the parties, that is, the one who objects to the arbitration, of the right to resort to the ordinary tribunals of the country, and he is entitled to say, "Shew me that I have agreed to refer this matter to an arbitrator." I say so, because it was attempted to be argued before us, and the case of *Willesford* v. *Watson* (1) was cited to shew that the Court would not decide that point. I must say that when Lord *Selborne's* decision comes to be examined it appears to me to shew by inference the contrary, for in referring the construction of the articles and the question as to certain acts which were alleged to be outside the agreement to the decision of the arbitrator, he went very carefully through the case, and very carefully through the provisions as to the reference to arbitration, and shewed that they were so wide that they not only included the construction of the document itself, but also the question as to whether the acts complained of were or were not within the terms of the matters referred to arbitration. Of course persons can agree to refer to arbitration not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause.

Therefore it appears to me that not only is there no authority for saying that this Court should not decide such a point, but that it is the bounden duty of the Court to decide whether the

(1) Law Rep. 8 Ch. 473.

matter in question is one which the party proposing the reference has agreed to refer to arbitration.

For these reasons it appears to me that the motion should have been refused, and the appeal must be allowed.

As regards the second point, I think it is right to say that the Court should have required an affidavit to be produced of readiness and willingness to refer to arbitration at the time when the motion was heard in the Court below. I suppose in the hurry of vacation business the point escaped the attention both of the legal advisers and the Judge, but the Court is required to be satisfied under the section, and therefore of course the Court must see that there is some evidence in support of the affirmative proposition. In this case there was none, and there was some little evidence of a disinclination to refer to any domestic tribunal, and an attempt to withdraw the claim to the Court of Bankruptcy by a motion to restrain the action altogether. But this point was not taken in the Court below. If it had been taken, no doubt the Judge, if satisfied of the *bona fides* of the applicant, and that he would not take advantage of the defect being pointed out to make an untrue affidavit as to the real facts of the case, would have given him an opportunity of making his case complete. Having heard what I have been told, and perhaps importing into the case some little knowledge of the parties, I think there would have been no doubt that the Judge would have given such leave in this instance. That being so, and the objection being taken for the first time in the Court of Appeal, if the Court had chosen to have decided upon that point alone, the Court would probably have given an opportunity to the Respondent (of course giving an opportunity also to the Appellant to meet the evidence) to file further affidavits upon this subject; and that being so, I do not think we should make our decision depend upon the fact of the absence of the affidavit, although that standing alone and unexplained, without any offer to make any further affidavit, might have occasioned a difficulty.

BAGGALLAY, L.J.:—

I agree in thinking that the appeal should be allowed, and I prefer to rest my decision upon the ground that the disputes or

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differences which had arisen between the parties were not differences or disputes within the meaning of the 23rd article of the partnership articles, though I agree with what has just been said by the Master of the Rolls as to there not being materials before the Court upon which it could have been satisfied that the Defendant had been always ready and willing to refer the matter to arbitration.

Now, the agreement which contains this arbitration clause was entered into under these circumstances: Mr. *Semenza* had obtained a contract for the construction of a railway in *Sardinia,* and this agreement was entered into between *Semenza* on behalf of himself and of a person to be nominated by him, and two other persons named *Docwra* and *Morris.* The present Plaintiff was the nominee of *Semenza* under that arrangement, and a partnership was formed between four persons, which at any rate continued down to the time when *Semenza* went into liquidation. The Defendant upon *Semenza's* going into liquidation became his trustee. I am not disposed to say anything upon the question whether the position occupied by the Defendant after *Semenza's* liquidation was that of a partner with the others, because I think that the course which has been pursued by the Plaintiff has precluded him from raising that question.

Now the differences or disputes referred to in the 23rd article must be construed with reference to the other portions of that agreement. I find in article 20 this: "All matters relating to the partnership are to be determined by a majority of the partners." And then, again, there is a stipulation "that the agreement and the fulfilment hereof, and all matters and things connected herewith, shall be interpreted and adjudged according to English law and customs." Therefore it appears to me that the differences or disputes referred to in the 23rd article are differences or disputes arising in the course of the conduct of the partnership business, having reference, possibly, to the discharge of the duties or the exercise of the privileges which one partner might have with reference to another, or with reference to all the others. But, regarding this case as it was presented to Mr. Justice *Stephen,* the dispute or difference between the parties amounted to this, namely, an assertion on the part of the Plaintiff

that the share of *Docwra* and the share of *Morris* which had been purchased by the Defendant had been purchased by the Defendant jointly for himself and for the Plaintiff. That was a question really outside the conduct of the partnership, and outside anything having reference to what the partners, as such, had done or left undone. When the question was decided whether those shares belonged to the Defendant alone or belonged to him and the Plaintiff jointly, then no doubt there might be questions of account to be settled and disputes might arise with reference to those accounts which would have been the subject of arbitration under the 23rd article, and the case is made more clear when we have regard to the statement of defence, which has been put in by the Defendant since the matter was before Mr. Justice *Stephen;* for the Defendant not only insists that the shares of *Morris* and *Docwra* were acquired by him for his own use, and that he was entitled by virtue of his appointment as trustee to *Semenza's* share, but he further contends that he has entered into a valid and subsisting contract for the purchase of the Plaintiff's share for the sum of £5000. If his contention is right the whole business belonged to him, and there was no question of account to be taken at all. On the other hand, if the points so raised by him are ultimately decided against him, no question of account can arise until the preliminary questions have been disposed of.

Upon these grounds I think that the appeal must be allowed.

THESIGER, L.J.:—

I agree that the order of the learned Judge cannot be supported, upon this simple ground: It is not necessary to give any exact definition of the meaning of the 23rd article of the agreement between the parties. It is obvious that that arbitration clause must be subject to some limitation or qualification, and possibly that which has been suggested by Lord Justice *Baggallay*, namely, that it must be a dispute or difference between the partners relating to the matters which were the subject of the previous articles, would be as good a definition as could possibly be given. But it is sufficient here to say that when it appears that the main dispute between the parties to this action was

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not anything relating to the transactions which were the subject of the different articles of the partnership agreement, but a dispute as to whether there was any existing partnership at all, it is clear that that is not a case which ought to be referred under the 11th section of the *Common Law Procedure Act*.

Solicitors for Plaintiff: *Lawrance, Plews, & Baker.*
Solicitors for Defendant: *Linklater, Hackwood, & Co.*

C. A. 1880 Feb. 14.

In re PEACOCK.

Trustee Act, 1850, s. 26—*Trustee Extension Act*, 1852, s. 6—*Appointment of new Trustees—Transfer of Securities—Unauthorized Securities—Form of Order.*

Form of order on appointment of new trustees where the trust funds are invested on unauthorized securities and it is desired not to transfer them into the names of the new trustees, but to sell them and reinvest the funds in accordance with the trusts of the settlement.

THIS was a petition for the appointment of new trustees in the place of others, one of whom was a lunatic. The principal part of the trust funds had been invested in securities which were not sanctioned by the settlement.

The petition prayed for the usual order that the right to call for a transfer of the securities into their own names might be vested in the new trustees, and for a transfer accordingly.

Ingle Joyce, for the Petitioner:—

We ask the Court to vary the usual order by omitting the direction to transfer the securities into the names of the new trustees. As most of the securities are unauthorized the new trustees would be committing a breach of trust in holding them; and it is therefore desired to sell them and to reinvest the funds in proper securities. The 26th section of the *Trustee Act*, 1850, says that the funds are to be transferred "into their name or names or otherwise." These words are quite general, and justify the variation asked for.

JAMES, L.J.:—

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You may take the usual order for appointment of new trustees with the right to call for a transfer of the funds to themselves or to any purchaser or purchasers, the trustees undertaking to hold the proceeds on the trusts of the settlement.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors: *Rooke & Sons*, agents for *Vaudrey, Manchester*.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* KINO.

C. A. 1880 V.-C. H. *Feb.* 26. C. A. *March* 5.

[1880 E. 4.]

Ancient Lights—Building pulled down—Injunction—Ecclesiastical Commissioners—Statute 23 *&* 24 *Vict. c.* 142.

Under the statute 23 & 24 Vict. c. 142, and an Order in Council, an ancient church in the city of *London* was vested in the Ecclesiastical Commissioners, upon trust to pull down the building, dispose of the materials, and sell the site. They pulled down the church, and the site was still vacant. The Defendant, who had become the owner of land formerly part of the glebe of the church, on which some low buildings had stood, commenced the erection of buildings which, if completed, would have materially obstructed the access of light to windows occupying the same position as those of the late church. The Ecclesiastical Commissioners commenced an action to restrain the erection of the proposed buildings:—

Held, by the Court of Appeal, reversing the decision of *Hall*, V.C., that the fact of there being no existing windows the access of light to which would be interfered with, was no objection to the granting an injunction if the right to access of light had not been abandoned:

Held, also, that the Ecclesiastical Commissioners had power to sell the site, with all the easements which had been enjoyed by the church, so that if the church had ancient lights the purchaser would have the benefit of them:

Held, also, that although the freehold of both the church and the glebe had throughout been vested in the rector, there was no such manifest impossibility for the church to have a title by prescription or grant to access of light over the glebe as to induce the Court to refuse an interim injunction till the trial:

And, *semble*, that such an easement might be effectually created.

UNDER the Act 23 & 24 Vict. c. 142, and an Order in Council dated the 23rd of October, 1876, the church of *St. Dionis Back-*

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church, in the city of *London,* became vested in the Ecclesiastical Commissioners, upon trust to pull down the church, dispose of the materials, and sell the site. The church was pulled down in August and September, 1878, and the materials disposed of. The church, as it was stated, had been built in 1674 on the site of a church which had been burnt in the great fire of 1666. An attempt was made in 1879 to sell the site, but no sale was effected, and the ground remained vacant.

In 1878 the Defendant entered into negotiations for a building lease of a set of very low buildings, Nos. 160, 161, and 162, *Fenchurch Street,* opposite to the church, which buildings he held for the residue of a term created by a lease from the rector of *St. Dionis Backchurch.* These negotiations were interrupted by a notice from the Commissioners of Sewers to purchase these houses for the purpose of some City improvements, and ultimately the Commissioners of Sewers bought them, and sold to the Defendant the freehold of so much of the site as was not required for the improvements. There appeared to be some doubt whether the land thus acquired by the Defendant had been part of the glebe of *St. Dionis Backchurch,* or part of the churchyard.

The Defendant commenced building upon the land thus purchased a set of buildings which were to be of considerably greater height than the buildings which had previously stood there. The Ecclesiastical Commissioners thereupon brought their action to restrain him from carrying his building to a greater height than the old buildings, or in such manner as to obstruct the ancient lights of the premises of the Plaintiffs as they were previously to the taking down of the church.

The Plaintiffs moved for an interlocutory injunction. After the commencement of the action, but before the motion came on to be heard, they set up a hoarding in the position of the wall of the church, with apertures in precisely the same position as the old windows. The Defendant's buildings had not yet been raised to as great a height as the buildings formerly standing on the Defendant's ground.

The motion was heard before Vice-Chancellor *Hall* on the 23rd of February, 1880.

Hastings, Q.C., and *Borrett,* for the Commissioners, after read-

ing the evidence, submitted that the site on which the church formerly stood was in the same position as if the building had been burnt down, and the ancient lights in the latter case would be protected: *Tapling* v. *Jones* (1). A temporary intermission of enjoyment of the ancient lights did not shew that there was an abandonment of the right to them. There was in fact no abandonment of the right, and it could not be inferred from pulling down the building that there was an intention to abandon it. The value of the site would be diminished if the right to the lights was taken away. The building was pulled down on purpose to make the site more profitable in the market as building land. The angle of forty-five degrees had no bearing on the question raised here, as the light came only from the Plaintiffs' direction. They referred to *Theed* v. *Debenham* (2).

W. Pearson, Q.C., and *Solomon*, for the Defendant, and

John Henderson, for the Commissioners of Sewers, were not called upon.

HALL, V.C.:—

It seems to me that the question raised on this motion for an injunction has not yet been dealt with by the Court. The question is, whether the owner of a building, with an easement of light belonging to him as the owner of such building—but the building itself having been taken down and now non-existing—can come to the Court and say: "I had a right to certain lights in a building which no longer exists. I can erect another building upon the site of the former building, and I can place windows in the new building in the same position as the windows were placed in the former building, and I am entitled to have the protection of the Court in respect of light to windows which I may place in the existing places occupied by the old windows."

The action seems to be rested on the ground that by obtaining an injunction the Ecclesiastical Commissioners will be able to go into the market and offer their property more advantageously to persons wishing to buy, by saying to them: "You can put such

(1) 11 H. L. C. 290. (2) 2 Ch. D. 165.

11 Jur. N.S. 309

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and such windows in such and such places, and I have got an order from the Court to protect them." The Plaintiffs come to the Court before anything has been done interfering with the enjoyment of light, and what is sought to be restrained may never interfere with the enjoyment of light. It may be that no new building will be erected, and if erected, it may be lighted from the roof or otherwise without windows occupying the positions of the old windows. It has not been contended that any action for damages can now be maintained, and it is not ascertained that any such action will ever be maintainable. I have not been referred to any case in which the Court has granted such an injunction as is now asked for, and counsel have stated that there is not any such case. I must refuse the motion; the costs will be costs in the action.

C. A. The Plaintiffs appealed. The appeal was heard on the 5th of March.

Hastings, Q.C., and *Borrett*, for the Appellants:—

The pulling down the church without any intention of abandoning the easement does not destroy the easement, the right continuing though its actual enjoyment is suspended: *Jones* v. *Tapling* (1).

[JAMES, L.J., referred to *Stokoe* v. *Singers* (2).]

Here there manifestly was no intention to abandon, and we applied for an injunction before the Defendant had built to such a height as to interfere with the light. If the right exists, the Court will interfere to prevent its being destroyed by the acts of the Defendant, although it is not at present being exercised: *Staight* v. *Burn* (3). We have set up a hoarding with apertures in the places of the old windows, so the Defendant cannot be misled. It is not necessary that there should be a complete house on the spot in order that an injunction may be granted: *Courtauld* v. *Legh* (4). According to the decision appealed from, if a person took a lease of a house, entering into a covenant to rebuild it, and pulled it down for that purpose, the neighbours could obstruct all

(1) 11 H. L. C. 290, 304.
(2) 8 E. & B. 31.
(3) Law Rep. 5 Ch. 163.
(4) Ibid. 4 Ex. 126.

the lights. The case made is that we cannot complain, inasmuch as forty-five degrees of light are left us. But that fact is only one among many that have to be taken into consideration, and there is no rule that forty-five degrees of light are *primâ facie* sufficient.

W. Pearson, Q.C., and *Solomon*, for the Defendant:—

In the first place, we contend that there never was any right at all to access of light to these windows. The rector for the time being was from time immemorial freeholder in possession both of the church and glebe, so that the church could not acquire an easement over the glebe either by the *Prescription Act* or under the doctrine of a lost grant, the whole doctrine of prescription depending on the owner of one property enjoying an easement over the land of another person.

[JAMES, L.J.:—Is the rector owner of the church in the same way as he is owner of the glebe? He is substantially a trustee of the church for the parish.

BRETT, L.J.:—If a person is beneficially entitled to one property and trustee of another, may not the latter acquire by prescription an easement over the former?]

There could not be any easement at law.

[JAMES, L.J.:—Has it ever been decided that the rector can build on the glebe erections which obstruct old windows in the church?]

We do not find that the point has ever been decided. Then another objection to the title of the Plaintiffs is that they have nothing in them but a bare site held on trust to sell.

[COTTON, L.J:—The statute vests the church in them.]

Yes, but only for a particular purpose, to pull it down and sell the materials; they could not sell the building as it stood; and it may be fairly concluded, therefore, that they cannot possess any rights annexed to the building. Again, the lights do not exist, and *non constat* that they ever will exist. The Plaintiffs cannot build, and therefore they cannot, as in *Staight* v. *Burn* (1), undertake to replace the ancient windows, upon which undertaking that case

(1) Law Rep. 5 Ch. 163.

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turned. Is the Defendant to be restrained perpetually from building so as to interfere with the access of light to windows which do not exist and may never exist? Again, as there are no existing windows, no action would lie, for no damage is done.

[BRETT, L.J.:—I do not say that it would, but I am not sure that it would not. I am disposed to think that damage could be shewn.]

We do not find any case in which an action at law has been held to lie where the easement was not actually existing. No doubt in equity relief might be obtained if the Plaintiff shewed that he was going to restore the easement, but not otherwise. But, supposing all these points decided against us, we say that there is no such interference with the light as will induce the Court to interfere. The Plaintiffs will have forty-five degrees from the zenith, and that *primâ facie* is sufficient: *City of London Brewery Company* v. *Tennant* (1); *Hackett* v. *Baiss* (2); *Theed* v. *Debenham* (3). We are willing to give an undertaking to pull down if the Court at the trial holds that the Plaintiffs' case is established, and on that undertaking the Court will allow the Defendant to go on where, to say the least, the Plaintiffs' case is so doubtful.

[THE COURT asked whether the Plaintiffs would be contented with this undertaking.]

Hastings, in reply:—

The Commissioners must press for a decision, for, having regard to their duty to sell, they consider that they cannot prudently allow the work to go on if they are entitled to prevent it. As regards the unity of possession in the rector, he is a dry trustee of the church with hardly any powers, so his possession of the church is entirely different from his possession of the glebe: *Marriott* v. *Tarpley* (4); *Prideaux*, Churchwarden's Guide (5).

JAMES, L.J.:—

In this case we have to consider whether an interlocutory

(1) Law Rep. 9 Ch. 212.
(2) Ibid. 20 Eq. 494.
(3) 2 Ch. D. 165.
(4) 9 Sim. 279.
(5) Page 353.

injunction ought to be granted. Upon the point upon which the Vice-Chancellor disposed of the application I am not able to agree with him. It appears to me that when a building, in which there are ancient lights, has been taken down, though the actual enjoyment of the light has been suspended, there is nothing to prevent the owner from applying to the Court for an injunction to restrain an erection which would interfere with the easement of the ancient lights, where the Court is satisfied that he is about to restore the building with its ancient lights. That was so decided by Lord Justice *Giffard* in *Staight* v. *Burn* (1), which unfortunately was not brought to the attention of the Vice-Chancellor. I cannot see any distinction between that case and this. There the house was taken down and a wall was left standing with holes in it. Here the church has been taken down, and the fact that no wall has been left standing with holes in it does not, in my opinion, make any substantial difference, because there is no doubt that the property, which is in the city of *London*, will be sold for the purpose of being built on, and there is very little doubt that, so far as possible, the purchaser from the Ecclesiastical Commissioners will take care to preserve the rights of light.

It also appears to me there is nothing in the objection that the Commissioners, because they were ordered to take down the church and sell the site, are in a different position from any other owner. They were the owners in fee simple of the church, and the very object was that they were to convey all the rights incident to the church, for the purpose of making the most money they could for the ecclesiastical purposes for which the purchase-money of the site was to be applied. It is clear that they were to have and to retain and give to a purchaser exactly the same rights which he would have had if he had bought the building as it stood.

Then it was argued that it is not shewn that there is any substantial injury to the light. Now upon that question the balance of the evidence (if indeed it can be said that there really is any evidence on the part of the Defendant) is very strongly in favour of the Plaintiffs, and shews that there will be that substantial interference with the access of light which makes it the duty of

(1) Law Rep. 5 Ch. 163.

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the Court to interfere. The fact that forty-five degrees of light are left is only a small element in the case. It may be used as a sort of test in the absence of any other mode of arriving at a conclusion; but there is no rule of law, no rule of evidence, and no presumption, except of the very slightest kind, that, where the angular height of an erection is less than forty-five degrees, the access of light is not substantially interfered with. What I said in *Kelk* v. *Pearson* (1) and *City of London Brewery Company* v. *Tennant* (2) was only a repetition, with very little variation of language, of what was said by Chief Justice *Best* in *Back* v. *Stacey* (3), which has always been considered as the direction which a Judge ought to give to a jury, and which is the direction we ought to give to ourselves. Now, as I have said, it appears to me upon the balance of evidence before us, that the proposed buildings of the Defendant would cause such a diminution of the access of light to these windows, when restored, as would very substantially diminish the value of the property.

The only other question to be considered is whether the point of law raised by Mr. *Pearson* is such as to induce us to hold our hands. His contention in substance was that, the one tenement being a church and the other glebe land, there was such unity of title and possession that there could not have been a valid grant of the right of light, and therefore that there is such an obvious defect of title in the Plaintiffs that we ought to hold our hands. I am not at present, speaking for myself alone, very much impressed with that contention. I am not at all inclined to the view that it was impossible for there to have been a valid creation of the right, legal or equitable, of access of light to the windows of the church, such as would have prevented the owner of the glebe from obstructing those windows. It would require a good deal to satisfy me that such a right could not be granted. As at present advised I think that there might have been a grant or a covenant by the rector to or with the churchwardens on behalf of the parish, made with the proper consents, that the church should for ever have the access of light and air to the windows. I can see no legal difficulty in the way of framing or presuming such a

(1) Law Rep. 6 Ch. 809. (2) Law Rep. 9 Ch. 212.
(3) 2 Car. & P. 465.

grant or covenant, nor do I see at present any doubt as to its legal validity, yet we are asked to assume that the creation of such a right is impossible, in the face of the fact that the church lately pulled down was rebuilt, so long ago as the time of Sir *Christopher Wren*, on the site of a church which probably had windows much in the same position, and in the face of the fact that from the time of Sir *Christopher Wren* to the present time the windows had existed and enjoyed the access of light. It appears to me that there is sufficient *primâ facie* evidence not only of the *de facto* enjoyment of the light, but of the lawful and rightful enjoyment of it as of right as between the church and the owner of the glebe, and that the doubt is not such as to induce us to hold our hand from doing what we should do in an ordinary case, namely, to stay the erection of these buildings till the hearing or further order.

BRETT, L.J.:—

Several very interesting points have been raised in this case, and the objections to the Plaintiffs' right to an injunction seem to me to class themselves thus. First, assuming that the proposed buildings would substantially obstruct the light into apertures similar to those existing in the church lately pulled down, yet it is objected that the Plaintiffs are not persons who in this Court and at this stage can object; and, secondly, supposing that the Plaintiffs are persons who can object, yet that there is not sufficient evidence that the proposed buildings would obstruct the light to such a degree as to authorize the Court to interfere.

The first point taken under the first class of objections is that there has been in this case such a unity of possession as would prevent the *Prescription Act* from applying, and would make it impossible to raise the supposition of a lost grant. I am inclined to think that if the objection of unity of possession can be maintained, it is equally important with regard to a lost grant as with regard to a prescription under the statute. If it were shewn that there was such a unity of possession as would prevent the possibility of there being a servient and dominant tenement, this would, in my opinion, be fatal to either view. This seems to me to be a very difficult question, and one that requires considerably

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more knowledge of ecclesiastical law than a Judge can have in his mind at the moment or is likely to acquire at this stage of the proceedings. I am not prepared to say at the present moment whether the rector, being the legal owner of the church, is a bare trustee of the church, or whether his rights with regard to the church and the churchyard are identical, or whether his legal rights with regard to the church and churchyard are the same or not as his rights with regard to the glebe. If he be merely a trustee of the church, and if he be in point of law and equity considered as the owner of the glebe, the inclination of my opinion at present is that as the owner of the glebe he might make it a servient tenement to the church of which he was only trustee, and that where a person is trustee of that which is to be the dominant tenement, and is beneficial owner of that which is to be the servient tenement, there is not such a unity of possession as prevents the application of the statute or the application of the doctrine of a lost grant.

It appears to be a matter of contention at the present moment whether the ground on which the proposed buildings are to be erected is part of the churchyard or of the glebe, but assuming it to be part of the glebe, I think we are entitled to say that at this stage we cannot assume that there was such a unity of possession as would prevent the application of the statute or of the doctrine of a lost grant. That objection, therefore, cannot avail at the present time, but must be gravely considered at the hearing.

Then another objection was taken on the ground that the Ecclesiastical Commissioners are only trustees to sell. I think it not worth while to inquire much into that point. I have no doubt that, even assuming them to be merely trustees to sell, that cannot oust them from the right to object to an obstruction to the lights of the buildings which they have to sell. Then it was said that by the statute and the Order in Council they have only vested in them the site of the church and the materials of the church itself, and that they have not vested in them any rights or easements which the church in other hands would have acquired. I think that objection equally untenable, and have no doubt upon the question.

Assuming, therefore, that the Ecclesiastical Commissioners are

persons who may come to the Court for such an injunction as is now asked for, we come to the question whether such an injunction ought to be granted where the building which was the dominant tenement has been pulled down. The way in which that strikes me is this: We must assume for this purpose that the building while it existed had the right to have its ancient lights unobstructed. The building is pulled down, and it is said that right is in abeyance. It seems to me that until the right is abandoned it is as much in existence after the building is pulled down as it was before, and I cannot help thinking that where a man has a legal right which can only be lost by his abandoning it, if he has not abandoned it, and until he abandons it it exists, and is as much in his possession as ever, although his actual enjoyment of it may be suspended. If he has the right, and it is in his possession and in existence, then, if the Defendant is about to do an act which will injure that right, I can see no reason why the ordinary doctrine should not be applied, and why the Court should not grant the injunction. It seems to me that *Staight* v. *Burn* (1) is an authority in favour of that proposition, and was decided on that ground, and not on the ground that there was an undertaking by the plaintiff to rebuild, which seems to me to be immaterial except as evidence to shew that he had not abandoned his right. The objection, therefore, that the building has been pulled down cannot prevail.

Then we come to the question, what amount of obstruction the Plaintiff must shew in order to obtain an injunction, and upon that was brought forward a doctrine as to forty-five degrees, which is relied upon either as a legal doctrine or as a rule of evidence which is to make a *primâ facie* case. Such a doctrine seems to me to be contrary to all the authorities which have always been relied upon in these cases, and to intimate that a Judge in charging a jury would have to tell them, "If the Defendant has left the Plaintiff forty-five degrees of light, there is *primâ facie* no injury to the Plaintiff, unless he can shew something particular in the circumstances of the case." I never heard of such a mode of directing a jury. Ever since *Back* v. *Stacey* (2) it has been settled that the proper direction to be given to a jury is that which was

(1) Law Rep. 5 Ch. 163. (2) 2 Car. & P. 465.

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laid down by Lord Chief Justice *Best* in that case, viz., that in order to give a right of action and sustain the issue, there must be a substantial deprivation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done. That is the ruling which has always been said to put the law in the clearest point of view, and it is in accordance with the judgment of Chief Justice *Tindal*, one of the most careful Judges who ever sat, in *Parker* v. *Smith* (1). It was adopted by Lord *Chelmsford* in the case of *Calcraft* v. *Thompson* (2), and has always been received. The question is, whether there has been not some interference but a substantial interference, and no reference has ever been made to forty-five degrees or any other number of degrees.

Then it was said that the law has been altered by the ruling of Lord Justice *James* in *Kelk* v. *Pearson* (3). I confess that his judgment there seems to me to be directly contrary to the proposition in support of which it is cited, for I find he says, "Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree which would be for a jury, if this were an action at law, to determine, but which it is for us, as Judges of fact as well as law, to determine for ourselves as best we may when we are determining it in Chancery," and he lays down the rule in almost the same words as Chief Justice *Best* in *Back* v. *Stacey* (4). Lord Justice *Mellish*, in the same case, quite as distinctly says that the question is not what may be considered by some persons as sufficient light in *London*, but that the question is one of degree and comparison between what the plaintiff had before the defendant's acts and what he has after them, and that there must be a substantial difference. In the case of the *City of London Brewery Company* v. *Tennant* (5), Lord Justice *James* laid down again the same rule that it is a question of fact and degree in each particular case, and although Lord *Selborne* took notice of the Act of Parliament about the forty-five degrees, I do not gather that he meant to say more than that the fact of there being forty-

(1) 5 Car. & P. 438.
(2) 15 W. R. 387.
(3) Law Rep. 6 Ch. 809.
(4) 2 Car. & P. 465.
(5) Law Rep. 9 Ch. 212.

five degrees of light is to be taken into consideration, not as raising a *primâ facie* case, but as one of the facts to be considered in determining whether there has been a substantial interference with the light the plaintiff had before.

I have ventured to say this, because to my mind the taking some expression of a Judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion, as laying down a rule of conduct for other Judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned Judge in a particular case as to the value of a particular piece of evidence is of no use to other Judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration.

I therefore think that in the present case the interim injunction ought to be granted, but that when the case comes to the hearing, there certainly will be a very grave question to be considered by the learned Judge who has to try it.

COTTON, L.J.:—

I also am of opinion that in this case the Plaintiffs are entitled to an interim injunction.

It is perhaps unfortunate, from the course the case took in the Court below, that only one of the points argued before us was dealt with by the Vice-Chancellor. I will deal with that first. His Lordship, as I understand, felt a difficulty in interfering when there was no building existing or in the course of erection, in respect to which the right to light could be enjoyed, and when the Plaintiffs were not in a position themselves to rebuild or to undertake to do so. It was said that the Court would not interfere when no right was being interfered with, in such a way as that an action at law could be maintained. It is unnecessary to give an opinion whether an action at law could be maintained in this case. The question we have to deal with is, whether or no a Court of Equity should interfere to prevent an injury to the Plaintiffs.

I will assume for the present purpose that the windows in the old church, which for centuries had had uninterrupted access of light, were windows which were entitled as of right to the access of light. Does the fact that the building has been pulled down

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put an end to the right? That cannot be so. The cases cited have settled that point, because in *Tapling* v. *Jones* (1) the building in which the ancient windows were had been pulled down, but yet it was held that when the new building was put up with windows in the old position they were entitled to the old right. There had therefore been no time at which the old right had ceased to exist, although its enjoyment had been suspended. And the cases have gone further than that, for in *Staight* v. *Burn* (2), where the bill was filed at a time when there was no actual building but only a bit of wall remaining, Lord Justice *Giffard* granted an injunction on an undertaking by the plaintiff that he would without delay rebuild, putting the windows in the old position. That establishes that even when there is no building existing (for the old wall could hardly be considered as a "house, workshop, or other building" within the meaning of the statute), still the Court will interfere by injunction to secure to the plaintiff the future enjoyment under the old right.

But then it was said here that the Plaintiffs themselves cannot rebuild, and that therefore what they have to do is to sell the site and the site only. I will deal with the latter part of the objection first. As I understand, they have vested in them under the Act of Parliament the building and fabric of the church and the ground on which it stood, and they have vested in them that building with every right which the church and the owner of the church enjoyed. No doubt they were required to pull down the church and sell the site, but in selling the site they could, in my opinion, convey to the purchaser all the rights they themselves would have had if they had been in the position of ordinary owners, having acquired the land with the intention or obligation to pull down the old building and put up a new one, in doing which, if they desired to continue the enjoyment of the old right of light, they could have put up the windows in the same position as formerly. Therefore, although they themselves cannot rebuild and are required to sell, they can, in my opinion, convey to the purchaser the same right which, if they had built, they would have had of putting up a building with windows in the old places, and entitled to the old easement.

Then it was said there is a difficulty in granting an injunction:

(1) 11 H. L. C. 290. (2) Law Rep. 5 Ch. 163.

how, it is asked, can we know that the building will be put up, or that, if the building is put up, the windows will be in this position? We are now dealing with an interlocutory injunction only, and upon the evidence and from the position of this property, we must arrive at the conclusion not only that within a short time the land will be sold, but that it will be covered with buildings, and I think we may come to the conclusion, as judges of fact, that in all probability the purchaser will put up his building so that the windows may have the enjoyment of the old right of light. If, on the hearing of this action, the property is not sold and no intention is shewn of putting up a building, and if it is not shewn satisfactorily to the Court what will be the position of the building or of the windows in it, then probably the difficulty will have to be met. But I think it will have to be met, not by putting the Plaintiffs or the owner under an undertaking, but by giving liberty to the Defendant to apply to dissolve the injunction if circumstances should occur which would make its further continuance unreasonable. Thus the Defendant would be relieved from the injunction if the Plaintiffs, or the purchasers from them, abandoned the right to put up the windows in the old place in exercise of the old right. That is not for decision now, but that, in my opinion, would be one mode of dealing with the difficulty and preventing any injustice being done.

Then, as to the other points in the case, an objection was taken by the Defendant that the windows in the old church were not entitled to light. The building had existed for two centuries, but there had been on the site of that building another building previously. After such a lapse of time it would require a very strong case to induce us to hold, upon an application for an interlocutory injunction, that the Defendant was entitled to erect a building which would materially interfere with those lights, if ancient, and would materially embarrass the Plaintiffs in dealing with the property in the way they are bound to do. Suppose that this piece of land on which the buildings are proposed to be erected was glebe, and has been so as long as the church has been there, I am not satisfied that the parson could not, with the consent of the patron and ordinary, deal with his glebe in such a way as at least in a Court of Equity to entitle those who could use and

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enjoy the church to say, "You have precluded yourself from ever interfering with the lights that there are in the church," for we must recollect that as regards his glebe the parson, with the consent of the patron and ordinary, could by deed, independent of the restraining statutes (and this church existed before the restraining statutes were passed), deal with and bind his glebe.

The other question which we must consider is, whether or no the works which the Defendant is intending to put up will substantially interfere with the beneficial use of the building which will probably be put up there. I say "with the beneficial use of the building," because it is not probable that any dwelling-house will be put up in this place, and the rule with regard to dwelling-houses is somewhat different, viz., that there must be a substantial interference with the comfortable enjoyment of the house. We must consider whether there is a substantial interference with the light, having regard to the use to which the building in this place will be put. [His Lordship then stated his conclusion to be that the erection of the proposed buildings would probably substantially interfere with the beneficial use of any warehouse which might be erected on the site of the church.]

I think I ought to add one word about the angle of forty-five degrees. I think that the way in which the provision as to forty-five degrees has been dealt with by Judges in the Chancery Division is unfortunate, the *Metropolitan Buildings Act* having been loosely referred to without looking at the clause. That clause is intended to deal with the width of streets, and is not intended to lay down any rule applicable to the light which a man is entitled to enjoy in the city of *London*. The angle of forty-five degrees is not taken from the windows, but from the top of one house to the level of the street on the other side, and, therefore, to derive from that enactment any rule to guide us in saying whether or no there has been a substantial interference with the use and enjoyment of the building as regards light, is, in my opinion, looking to a rule laid down for one purpose as a guide in an entirely different matter. When the buildings do not rise above the prescribed angle there will probably, under ordinary circumstances, be no substantial interference with the enjoyment of light; but that is not a rule to guide a jury or the Court in coming to a conclusion as to whether

there is a substantial interference; it is only a circumstance which will very often be a sufficient guide, but which, in the circumstances of the present case, appears to me to furnish no guide at all.

Then ought we to interfere by injunction after the undertaking that has been offered? Probably if the Plaintiffs had been persons in the position of ordinary owners going to rebuild, I, for my own part, should have been satisfied with that undertaking, and for this reason, that we then should have had the means of testing by experience, and not by mere argument, what would be the effect of the Defendant's building. When such an undertaking is given, it must never be made illusory. It is an undertaking given by the Defendant, who says, "My works can never interfere with your lights;" and if it is found that they do, his undertaking ought to be rigorously enforced, and he never ought to escape by the suggestion that as the building is up, damages ought to be given instead of a perpetual injunction. In the present case the Plaintiffs are in a peculiar position. They cannot themseves build, but they are bound to sell, and as they are not satisfied with that undertaking, and consider it more for their interest, having regard to the proposed sale, to have an injunction, though that can in no way ultimately decide their rights, I think we ought to grant the injunction to prevent anything being done which can interfere with the access of light to windows in the position of the old windows until the rights of the parties are decided.

An injunction was accordingly granted until the trial or further order to restrain the Defendant, his servants, workmen, and agents from erecting or raising on the site of certain old buildings in *Fenchurch Street*, in the city of *London*, which lately stood in front of the late church of *St. Dionis Backchurch*, and have recently been taken down by the Defendant or by the Commissioners of Sewers of the City of *London*, any erection or building so as to darken, hinder, or obstruct the lights of any building to be erected on the site of the said church, so far as such lights occupy the same position as the lights of the church.

Solicitors: *White, Borrett, & White; H. C. Morris.*

C. A.
1880
Feb. 24, 27, 28; Mar. 1, 2, 15.

VON HEYDEN *v.* NEUSTADT.

[1878 V. 22.]

Patent—Sale in England of a Material made Abroad by a Patent Process—Infringement.

Where a patent has been granted in *England* for a new process for producing more cheaply a chemical product which was previously known, the importation and sale in *England* of this substance made abroad according to the patented process is an infringement of the patent.

THIS was an action to restrain the Defendants from selling in the *United Kingdom* any salicylic acid made according to the process for which letters patent now vested in the Plaintiff had been granted, or according to any process which was a colourable imitation thereof.

Salicylic acid was well known previously to the grant of the letters patent as a useful medicine and a powerful antiseptic. In 1868 it was sold at 13*s.* an ounce, and continued very expensive. In 1874 the letters patent were granted for the process in question, by which it could be produced for about 7*s.* 6*d.* per pound.

The Defendants imported and sold in *England* salicylic acid manufactured by a German firm according to a process for which letters patent were granted in *England* in 1877 to *Neustadt*, one of the Defendants.

The Defendants disputed the validity of the Plaintiff's patent and the fact of infringement.

Vice-Chancellor *Bacon* gave judgment for the Plaintiff, being of opinion that the Plaintiff's patent was valid, and that the process according to which the salicylic acid sold by the Defendants was made was substantially the same as the patented process. His Lordship accordingly granted an injunction restraining the Defendants from selling in *England* salicylic acid so made during the term of the Plaintiff's patent.

The Defendants appealed.

Sir *J. Holker*, A.G., and *Everitt*, for the Appellants.

[Towards the close of the argument for the Appellants Lord

Justice *James* asked whether the sale in this country of a product made abroad could be restrained because it was made according to a process which was the subject of an English patent, the patent being only for a new method of making a product previously well known.]

Aston, Q.C., Sir *H. Jackson*, Q.C., and *Macrory*, for the Plaintiffs:—

We contend that such a sale is an infringement, and that the point is settled by authority: *Elmslie* v. *Boursier* (1), approved in *Wright* v. *Hitchcock* (2). A similar principle was acted upon in *Neilson* v. *Betts* (3).

Sir *J. Holker*, in reply:—

Elmslie v. *Boursier* and *Wright* v. *Hitchcock* are not binding on the Court of Appeal, and ought not to be followed. The principle, if carried out, would lead to absurd consequences. Suppose a process to be patented for making flour by crushing wheat instead of grinding it, and suppose all the millers in *France* were to make flour according to that process, is the importation of flour from *France* to be prohibited?

[BRETT, L.J.:—If anybody may go over to *Boulogne*, manufacture according to a patent process, and send the product to be sold here, the letters patent will be absolutely nullified.]

The patent does not give a monopoly of the product, but only of the process. The point in *Neilson* v. *Betts* was different.

March 15. The judgment of the Court (*James*, *Brett*, and *Cotton*, L.JJ.) was now delivered by JAMES, L.J., who after disposing of the objections taken to the Plaintiff's patent, and stating the reason of the Court for coming to the conclusion that the process according to which the salicylic acid sold by the Defendants was made was substantially identical with the Plaintiff's process, continued:—

In the course of the argument a doubt was suggested from the

(1) Law Rep. 9 Eq. 217. (2) Law Rep. 5 Ex. 37.
(3) Law Rep. 5 H. L. 1.

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Bench whether, if a process is patented in *England*, and the patent is for the process only, and that process is imitated abroad, the importation of the product from abroad and the sale of it here is an infringement of the patent. But it appears that very point was raised and decided by me as Vice-Chancellor in the case of *Elmslie* v. *Boursier* (1) as far back as the year 1869, and that that case was approved of, adopted, and followed by the Court of Exchequer in the same year in the case of *Wright* v. *Hitchcock* (2). The latter case was, it is true, against the vendor of a product made in this realm. But that makes no difference in the principle, which is that the mere vendor of such a product is an infringer. These cases have never been questioned. It is, of course, open to us as a Court of Appeal to reconsider, and, if satisfied that they were erroneous, to overrule the decisions of the two Courts of first instance. But we see no ground for dissenting from them. It is true that the statute of *James* only mentions "the sale, working, or making of any manner of new manufacture within this realm." But it is to be observed that the statute gives no right to the inventor. The statute is a statute for abolishing and forbidding monopolies, and the 6th section, under which the Crown acts in these matters, is a mere proviso excepting from the operation of that Act certain patents or grants of privileges which are to be "of such force as they should be if that Act had never been made, and of none other." And it is from the ancient power and prerogative of the Crown, so saved and preserved, that every patentee derives his monopoly. What the Crown could lawfully do, and has lawfully done, after that statute is shewn by the uniform tenor of the letters patent which have since been issued—issued by the advice and authority of every law officer and every holder of the Great Seal for upwards of two centuries and a half. The power of the Crown to grant such letters patent of such tenor and their validity has never been brought in question, and such form of the letters patent has now been expressly authorized by the 15 & 16 Vict. c. 83, s. 54. Nor has there been any straining of the old statute in what has been so done and authorized. All that was required was to assume that, when the Crown's right to grant the sole privilege of work-

(1) Law Rep. 9 Eq. 217. (2) Law Rep. 5 Ex. 37.

ing or making was saved, there was saved with it the power to make such privilege effectually profitable to the true inventor. The question, therefore, is to be determined by the true construction of the letters patent themselves. It was on that construction of the letters patent that the case of *Elmslie* v. *Boursier* (1) was decided; and we see no reason to doubt the conclusion there arrived at that the sole right granted by the Crown "to make, use, exercise, and vend the invention within the *United Kingdom*, and the right to have and enjoy the whole profit, benefit, commodity, and advantage accruing and arising by reason of the said invention," includes a monopoly of the sale in this country of products made according to the patented process, whether made in the realm or elsewhere. It may be added that the patent in another part expressly forbids any person directly or indirectly to make, use, or put in practice the invention. A person who makes, or procures to be made, abroad for sale in this country, and sells the product here, is surely indirectly making, using, and putting in practice the patented invention. Any other construction would, in fact, in the case of any really valuable invention of a process, render the whole privilege granted by the Crown futile. When the patent was an English patent only, an imitator would only have had to establish his factory on the other side of the border, and now such an imitator would only have to establish his factory or use the chemical process at *Boulogne* or *Ostend*, and he would effectually deprive the inventor of the "whole profit, benefit, commodity, and advantage" of his invention; and, the more valuable the invention, the more certain it would be that the prohibition in the letters patent would be so indirectly avoided—that is to say, evaded. We are of opinion, therefore, and conclude that the Plaintiff has established the validity of his patent and the infringement of it, and that the appeal must be dismissed with costs.

Solicitors for Plaintiff: *Van Sandau & Cumming.*
Solicitors for Defendant: *Lumley & Lumley.*

(1) Law Rep. 9 Eq. 217.

C. A.
1880
March 5, 6, 8.

LEVY *v.* LOVELL.

[1878 L. 113.]

Foreign Attachment—Lord Mayor's Court—Creditor holding Security—Liquidation—Bankruptcy Act, 1869, *ss.* 12, 16, *sub-s.* 5.

A creditor who has served a writ of foreign attachment in an action in the Lord Mayor's Court, but has not obtained judgment in the action before the commencement of the bankruptcy or liquidation of his debtor, is not "a creditor holding security on the property of the debtor" within the meaning of sect. 12 of the *Bankruptcy Act*, 1869.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1).

The facts, which are given in full detail in the previous report, may be shortly stated as follows:—

Elizabeth Levy carried on business, as executrix of her husband, *Henry Levy*, at premises in *High Street, Islington*, which were insured against fire in the *Phœnix Insurance Company*.

On the 21st of January, 1878, a writ was served on her in an action in the Exchequer Division brought by *J. Genese* and *N. Edwards* for £40 8s., for goods sold and delivered to *Henry Levy*, her late husband.

On the 23rd of January a fire occurred on the insured premises, the damage for which was assessed at £330.

On the 5th of February *Genese* and *Edwards* served the Defendants *Lovell* and *Bromfield*, who were the public officers of the *Phœnix Insurance Company*, with a writ of attachment in an action in the Lord Mayor's Court, brought by them against Mrs. *Levy* for £40 8*s.* 5*d.*, attaching all her property in the hands of *Lovell* and *Bromfield*, but no further steps were taken in the action.

On the 11th of February judgment was obtained by *Genese* and *Edwards* in the action in the Exchequer Division for £40 8*s.* and costs.

On the 25th of February Mrs. *Levy* filed a liquidation petition, and a resolution for liquidation was afterwards passed, and a trustee appointed.

(1) 11 Ch. D. 220.

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On the 13th of April Mrs. *Levy* commenced the present action, as her husband's executrix, against *Lovell* and *Bromfield* in the Chancery Division, claiming the payment of £330, the amount of the policy money. The money being also claimed by the trustees in the liquidation, and by *Genese* and *Edwards*, the Defendants *Lovell* and *Bromfield* interpleaded, and on the 14th of May an order was made on the interpleader summons that the money should be paid into Court in this action, and that all proceedings against them should be stayed, except such as might be necessary for carrying into effect this action; and that the question as to the policy money should be tried before the Court without a jury, that is to say, whether *Genese* and *Edwards* had any and what charge, lien, or security, under the *Bankruptcy Act*, 1869, by reason of the attachment issued by them upon the fund.

The Vice-Chancellor held that the service of the attachment had the effect of giving *Genese* and *Edwards* a charge upon the debt due from the *Insurance Company*, and ordered that the sum due to them should be paid out of the fund in Court.

From this decision the trustee in liquidation appealed.

Sir *H. Jackson*, Q.C., and *J. G. Laing*, for the Appellant:—

The simple question now before the Court is whether a creditor of a bankrupt, who has served a writ of foreign attachment on a third party who owes money to the bankrupt, is a secured creditor within the 12th section of the *Bankruptcy Act*, 1869, although he has not obtained execution in the Lord Mayor's Court. We contend that the writ gives the creditor no charge on or right to the Defendant's property or debt in the hands of the garnishee until it is perfected by execution. The writ of foreign attachment is simply a process to compel the appearance of the Defendant, who might be out of the jurisdiction of the Court. If the Defendant appears and surrenders himself into custody till the trial of the action, or finds bail that he shall be forthcoming at the trial, or for payment of the debt, the writ of attachment falls to the ground: *Redhead* v. *Welton* (1); *London Joint Stock Bank* v. *Mayor of London* (2); *Mayor of London* v. *Cox* (3). If the right

(1) 29 Beav. 521. (2) 1 C. P. D. 1.
(3) Law Rep. 2 H. L. 240.

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to the debt after the issue of the writ passes to another person by operation of law, as in the present case, the writ also fails; for the garnishee might plead that the debt was not the debt of the Defendant, and no execution could be issued against him: *M'Daniel* v. *Hughes* (1); *Richter* v. *Laxton* (2); *Brandon* on Foreign Attachment (3). The attachment does not justify the garnishee in paying the debt to the Plaintiff until execution has been levied: *Wetter* v. *Rucker* (4). If he does pay the debt to the Plaintiff, except under an execution, it will be no defence to an action by the Defendant in another Court: *Magrath* v. *Hardy* (5); *Smidt* v. *Ogle* (6). And now, since the *Debtors Act*, 1869, if the Defendant surrenders and is taken into custody, he cannot be kept in prison after the final judgment: *In re Wilkins* (7). So that, except in the rare event of the Defendant not appearing at all, and no change taking place in the ownership of the debt, the writ of attachment is no assistance to the Plaintiff in recovering the debt, and therefore it cannot be considered a security for the debt under the *Bankruptcy Act*. The cases which have been decided respecting garnishee orders under the *Common Law Procedure Act* have no application. Those orders derive their efficacy from the statute and not from custom, and are intended to give a security to the Plaintiff as to property, and not merely to compel appearance.

De Gex, Q.C., and *Romer* (*Phipson* with them), for *Genese* and *Edwards*:—

It is admitted that if this had been a garnishee order made under the *Common Law Procedure Act* the Plaintiff would have been a secured creditor under the 12th section of the *Bankruptcy Act*. That is put beyond question by *Emanuel* v. *Bridger* (8); *Ex parte Joselyne* (9). It is said that a writ of foreign attachment stands upon a different footing. But that very point was decided in our favour by Vice-Chancellor *Hall* in *Re London Cotton Mills*

(1) 3 East, 367.
(2) 27 W. R. 214.
(3) Pages 7, 104.
(4) 1 Brod. & B. 491, 500.
(5) 4 Bing. N. C. 782.
(6) 6 Taunt. 73.
(7) Law Rep. 8 Q. B. 107.
(8) Ibid. 9 Q. B. 286.
(9) 8 Ch. D. 327.

Company (1). Although the writ may have had its origin in a desire to make the Defendant amenable to the jurisdiction of the City Court, yet it practically had the effect of giving the Plaintiff a security on the debt. For, having issued the writ, it followed that by means of it he either got security for the payment of the debt from the bail, or else an equivalent, namely, satisfaction in the person of the debtor. And although since the *Debtors Act* the power of ultimate detention of the debtor in prison is taken away, and thus the remedy of the Plaintiff is reduced in efficacy, yet its present operation is quite sufficient to make it a charge or security on the debt within the Act. The rights of the Plaintiff with respect to the debt accrue as soon as the writ is served: *Denton* v. *Maitland* (2). The garnishee from that time cannot pay it to the debtor. It is not less a charge because it may be defeated by what happens subsequently. In *Verrall* v. *Robinson* (3) it was held that the service of a writ of foreign attachment placed the property attached *in custodiâ legis*. It cannot be parted with in the absence of the Plaintiff, and that is sufficient to make him a secured creditor under the Act: *Ex parte Banner* (4); *Shand* v. *Du Buisson* (5). It is not necessary for us to shew that the Plaintiff acquired a property in the debt. The word "security" has a wide sense in the bankruptcy law: *Ex parte Bouchard* (6). When a sheriff seizes the goods of a debtor, that does not pass the property to the creditor: *Giles* v. *Grover* (7). The bankruptcy of the Defendant makes no difference. Bankruptcy cannot be pleaded; the remedy is usually to restrain the proceedings by injunction: *White* v. *Simmons* (8). But no Court would stop the Plaintiff's proceedings in the Mayor's Court, because he is only enforcing his security. Although the Defendant was declared a bankrupt at the time of the trial in the Mayor's Court the jury would find that the debt was due to the Defendant, because that would include his assigns.

Sir *H. Jackson*, in reply.

(1) 25 W. R. 109. WN(1876)283.
(2) 15 L. J. (Q.B.) 332.
(3) 2 C. M. & R. 495.
(4) Law Rep. 9 Ch. 379.
(5) Law Rep. 18 Eq. 283.
(6) 12 Ch. D. 26.
(7) 9 Bing. 128.
(8) Law Rep. 6 Ch. 555.

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JAMES, L.J.:—

I am of opinion that our decision must be in favour of the Appellant. There are, no doubt, authorities on both sides; some of which must be overruled by the effect of our decision. In favour of the Appellant there are the decisions of Lord *Romilly* in *Redhead* v. *Welton* (1) and of Mr. Justice *Lush* in *Richter* v. *Laxton* (2), and on the other side there are the decisions of Vice-Chancellor *Hall* in the *London Cotton Mills Company* (3), as well as Vice-Chancellor *Bacon* in this suit. But what we have to determine in this case is, what is the process of foreign attachment? It is clear that foreign attachment is in its substance, origin, and intention a process to compel appearance. The Mayor's Court not having jurisdiction over a foreigner, the Court gives itself jurisdiction by attaching his goods in the city of *London*, or debts due to him within the City. The object is to compel him to come in and plead. If he comes and remains within the jurisdiction or surrenders himself into custody till the trial, and is ready to be taken in execution at the end of the action, the whole process of attachment fails. It is a mere process for compelling the Defendant to come in and remain within the jurisdiction till the end of the trial.

It is true that indirectly, in certain events, the process would ultimately give to the Plaintiff in the Mayor's Court execution for the amount of his debt which he recovered to the extent of and out of the money due from the garnishee. If the debtor fails to appear, he is considered to have admitted that the debt claimed was due to the extent of the money in the hands of the garnishee. If the Defendant appears—but only in this event, and in case nothing is done in the meantime—and renders himself up, the process is at an end, and the Plaintiff has no more claim upon the moneys attached. In order to entitle him to execution against that part of the Defendant's property, it is clear from the form of the finding that the jury are obliged to make before execution can issue, that it must appear that the money not only was at the time of the attachment, but is at the time of the finding, still

(1) 29 Beav. 521. (2) 27 W. R. 214.
(3) 25 W. R. 109. W.N.(1876) 133.

due from the garnishee to the Defendant. In one case, no doubt, the money would be still due, namely, if the garnishee had voluntarily paid it to the Defendant, because he would not be authorized to pay it, and he would be estopped from setting up such a payment, and the Plaintiff's rights would not be affected. But however that may be, it is impossible to apply the same principle to a case in which, before the jury can give their verdict, the debt, by operation of law, has ceased to be due to the Defendant, and has been transferred to another person whose duty it is to hold it for the purpose of distributing it equally among the Defendant's creditors. After the commencement of the bankruptcy it would be impossible for the jury honestly to find that the debt still belonged to the Defendant, and it would be therefore impossible that it could be applied in payment of the debt found due to the Plaintiff in the action.

On this ground alone I am of opinion that it is impossible that this debt should be applied in payment of the debt due to the Plaintiff, and consequently I must hold that the Plaintiff had no charge on the property of the Defendant.

BRETT, L.J.:—

It appears to me that the Plaintiff cannot succeed in this case unless the process of foreign attachment gives in favour of the Plaintiff a charge on the debt due from the garnishee within sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869. A great many points have been argued about which it is not necessary to give an opinion. But the main argument of the Respondent was that from the moment the writ of attachment was served on the garnishee he could not voluntarily pay the Defendant in the Mayor's Court, and it was argued that the Defendant could not from that moment enforce payment by the garnishee by any suit; and that although by the Defendant's appearance in the Mayor's Court the attachment would be taken off, still the Plaintiff would necessarily obtain an equivalent—that is, the Defendant must either pay the debt claimed into Court, or must give bail to surrender after judgment, or must be imprisoned, which would amount to satisfaction of the debt, and if he did not surrender to his bail, would be bound to pay the debt. Therefore it was said that,

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although the particular debt attached would be released by the appearance of the Defendant, still the Plaintiff, by reason of the attachment, would get an equivalent security. But a due consideration of the cases respecting the process of foreign attachment shews that this argument cannot prevail. The principal authorities are *In re Wilkins* (1) and *Smidt* v. *Ogle* (2). It is true that a garnishee cannot voluntarily pay the debt to the Defendant but *Smidt* v. *Ogle* decisively shews that, notwithstanding an attachment in the Mayor's Court, the Defendant could continue a process in another Court, by which he may insist on the garnishee paying the debt to him. For it shews that the attachment cannot be pleaded in a superior Court, and the superior Court will not stay the action because of the attachment. And if the attachment cannot be pleaded, and the superior Court will not stay an action on account of it, it is obvious that the Defendant in the Mayor's Court may maintain his action in the superior Court against the garnishee, and may obtain execution against him.

Then the case of *In re Wilkins* shews that, even if the Defendant does enter an appearance and the Plaintiff takes bail or obtains satisfaction by putting the Defendant in prison, still the attachment falls; for that case shews two things, first, that if the Defendant surrenders himself before judgment, then the attachment is dissolved against the garnishee, and the Defendant, being given into custody, could only be kept in prison till the trial; and also that if the Defendant appeared and gave special bail, yet when the judgment is given the bail would be released if the Defendant was present, and then, in these days, the Defendant must go at large without paying the debt by reason of the statute which abolishes imprisonment for debt after judgment. Therefore it is not true that, either by surrender of the debt or before judgment or after judgment, or on the bail bond being given, the Plaintiff would necessarily obtain payment or satisfaction under the writ of attachment. Therefore it follows, from this view of the process of foreign attachment, which is shewn to be the right one by these two cases, that it is only a means of enforcing appearance in the Mayor's Court: it is only a mesne process, something in the nature of a *distringas* to enforce appearance. It is true that in one

(1) Law Rep. 8 Q. B. 107. (2) 6 Taunt. 73.

state of circumstances the Plaintiff would obtain payment by means of the debt due from the garnishee, that is, if the writ was served on the garnishee, if the Defendant did not appear at all, and if the garnishee did not dispute the debt due from him to the Defendant. In that one state of circumstances the Plaintiff would obtain payment from the garnishee. That raises this question: Can a process by a Plaintiff which has effect on property or a debt only for a particular purpose, namely, to compel appearance, but which can only take effect on that property or debt so as to obtain the realization of the debt due to the Plaintiff out of that property or debt in one particular state of circumstances, be called a charge on that property or debt within the meaning of sects. 12 and 16 of the *Bankruptcy Act*, 1869? In my opinion it cannot: and a process can only be called a charge or security if it can be enforced against the property under all circumstances, and not if it can be enforced in one particular state of circumstances only. For this reason, I am of opinion that the Court must give judgment in favour of the Appellant, and in accordance with the decisions of Mr. Justice *Lush* in *Richter* v. *Laxton* (1), and Lord *Romilly* in *Redhead* v. *Welton* (2), and against the opinion of Vice-Chancellor *Hall* in *Re London Cotton Mills Company* (3).

COTTON, L.J.:—

The simple question is, whether the creditor in this case has a security on the property of his debtor under the *Bankruptcy Act*. This depends on sect. 12 and sect. 16, sub-sect. 5, of that Act; for, although the latter clause does not profess to interpret sect. 12, yet it is certainly a guide to its interpretation. Now sect. 16, sub-sect. 5, says that "a secured creditor means any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as security for a debt due to him." So that the charge must be on the bankrupt's property, and it must be for a debt due to the creditor. All that sect. 12 does is to reserve to the creditor the power of realizing such security as he has. The question, therefore, is, whether this writ of attachment is a security on the

(1) 27 W. R. 214. (2) 29 Beav. 521.
(3) 25 W. R. 109. W.N. (1876) 285.

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bankrupt's property for a debt due to the Plaintiff. Certainly the origin of a foreign attachment is in favour of its not being a security for the Plaintiff's debt. It was issued on a suggestion that the debtor was not subject to the jurisdiction of the Court, and for the purpose of compelling him to appear. How then could it be got rid of? I assume that a voluntary payment by the garnishee to the debtor would not be valid, but the attachment might be avoided by the appearance of the Defendant in Court and his submitting to be taken into custody; or by his finding bail either to surrender at the end of the trial, or to pay the money. That sufficiently shews that it was not a security on the property of the Defendant for payment of the debt claimed. It is simply a process to compel appearance; and although in a certain event, namely, if the Defendant does not appear at all, execution may be obtained under it against his property, yet in the other event the attachment fails to assist the Plaintiff in recovering his debt. That being so, I am of opinion that it is not a security on the Defendant's property within the meaning of the Act. It is argued that the Plaintiff, though he may not get payment, may get satisfaction of his debt under the attachment by putting the Defendant in prison; but that is not a security on the property of the Defendant, it is only a remedy against his person. In my opinion that disposes of this case; but I also agree with Lord Justice *James* that the Plaintiff's case fails on the ground that, after the commencement of the liquidation, it is assuming the question to hold that the action in the Mayor's Court can go on. It appears to me that it cannot go on, because the cause of action has been transferred to the trustee for the benefit of the Defendant's creditors.

Several cases have been cited for the purpose of proving that the attachment was a security. In *Verrall* v. *Robinson* (1) it was merely held that the garnishee did not convert the property attached by refusing to deliver it up, because it was in the custody of the law; but that is quite consistent with the attachment being a process to compel appearance only. In the same way as a *distringas* on stock is a justification to the *Bank of England* in refusing to transfer the stock; but it gives the person who obtains it no security, it only delays the transfer till he can enforce what

(1) 2 C. M. & R. 495.

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security he may have. Another case cited was *Shand* v. *Du Buisson* (1). But there the money had been paid into the Court of Chancery, and the Court merely determined to whom it justly belonged.

With respect to garnishee orders, they depend for their force on an Act of Parliament, and when the order *nisi* is made it is binding between the Plaintiff and Defendant, and that makes it a security as soon as the order is made. It is, in fact, a final judgment between the parties, and is very different from a mere process to compel appearance, which the Defendant may get rid of by appearing.

Solicitors: *Bradford & Hare; J. Keily.*

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C. A. 1880 *March* 18.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Bankruptcy Rules*, 1870, *r.* 171—*Discovery of Bankrupt's Property—Summoning Witnesses for Examination—Application by Creditor—Opposition by Trustee—Filing of Affidavits—Judicial Discretion of Registrar—Appeal.*

A creditor who applies to the Court under sect. 96 for leave to summon witnesses for examination as to a bankrupt, his trade dealings or property, is bound to shew a *primâ facie* probability that some benefit will result to the estate or to the creditors from the proposed examination.

Where the Registrar in the exercise of his judicial discretion has refused such an application, the Court of Appeal will not readily interfere.

The trustee in the bankruptcy has no interest in the matter except for the purpose of saying whether he is willing to conduct the examination himself, and, *semble*, he ought not to file affidavits in opposition to the application.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 2nd of September, 1879, *James Willson*, a licensed victualler, filed a liquidation petition. The first meeting of the creditors was held on the 23rd of September, when Mr. *W. L. Clifton Browne*, an accountant, was appointed trustee. He summoned a general meeting of the creditors, to be held on the 23rd of December, 1879, to receive his report as to the realization of

(1) Law Rep. 18 Eq. 283.

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the debtor's property, to audit the trustee's accounts and to determine his remuneration, to fix the close of the liquidation, to release the trustee, and to consider the discharge of the debtor. On the 22nd of December, 1879, Messrs. *J.* and *W. Nicholson & Co.* distillers, who were creditors of the debtor, and had proved a debt in the liquidation, gave notice to the trustee that they should apply to the Court of Bankruptcy on the 13th of January, 1880, that a private sitting, under sect. 96 of the *Bankruptcy Act*, 1869, might be appointed for the examination of the debtor, and of *Benjamin Beach*, *Mary Ann Willson*, and *P. J. Willson*, and for leave to issue subpœnas for the attendance of witnesses at the private sitting, and that the costs of and incidental to the motion might be provided for.

In support of the motion an affidavit was made by Mr. *J. E. Meek*, a member of the applicants' firm, in which he stated that on the 23rd of November, 1878, the debtor had executed a bill of sale of substantially the whole of his property in favour of *Benjamin Beach*, the consideration expressed in the deed being a sum of £125 then due from the debtor to *Beach*, a liability to the extent of £400 which *Beach* had incurred as a surety for the debtor, and a present advance of £200 by *Beach* to the debtor. The deponent said that he was desirous of examining the debtor with a view of ascertaining how and when the £200 was actually advanced to the debtor.

The deponent also made the following statements:—that the debtor and *Beach* had been for some considerable time mixed up in monetary transactions with reference to the public-house which the debtor had occupied; that the liquidation petition was filed by the solicitors of *Beach* on behalf of the debtor; that the statement of the debtor's affairs disclosed debts to *Mary Ann Willson* (who was the debtor's mother) and *P. J. Willson*, who was also a relative of the debtor, which the deponent was desirous of inquiring into, and that, upon perusal of their proofs, he was informed that they purported to be for money lent, without any dates being given as to the time when such money was advanced. These proofs were, as he was informed by his solicitors, prepared by the debtor's solicitors, who were appointed proxies, and voted in favour of the appointment of *Browne* as trustee. The deponent

also said that he had been informed by the debtor that his creditors were trade creditors only, and that in the interest of the creditors generally he was advised that it was essential that a private sitting should be granted for the purpose of examining the debtor and the other persons mentioned with reference to their proofs and transactions with the debtor. He also said that he believed that the debtor was possessed of some property in mortgage, the particulars of which appearing in his statement of affairs were of the barest possible description, and required investigation. The deponent said that he was also of opinion that the examination of the debtor and the other persons mentioned could not possibly be conducted by their own solicitors, who were the solicitors of the trustee, and that his firm were therefore willing to bear the expense of such investigation, if conducted by their own solicitors and counsel, and to put the depositions upon the file for the use of the trustee. The applicants had asked the trustee to allow them to use his name for the purpose of obtaining an application for a private sitting for the proposed examination, but the trustee had declined to allow his name to be used.

The trustee opposed the application, and made an affidavit in opposition to it. The debtor, and the other persons whom it was proposed to examine, also made affidavits in opposition.

The Registrar refused the application with costs. In the course of his judgment he said: "It appears to me that no decision has ever overruled the general rule that the trustee must be held to represent the general body of creditors, and that all investigations into the affairs of the bankrupt should be made by or through him, until it is distinctly shewn that his interests are adverse to those of the general body of creditors, or that he is incapable of conducting the examination, not that he is guilty of any impropriety, for then of course the object would be to remove him, and that is not suggested in the present case. Of course the trustee might be so situated that obviously he could not take a just view of the affairs as between the debtor and the creditors, and under such circumstances the matter ought to be taken out of his hands. In the present case, however, the trustee is not in that position . . . On the simple suggestion of one creditor that he is entitled to pursue this course, I do not think that

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I ought to open the door to such an extent as would allow an investigation to be made by every creditor as to every imaginable debt of the debtor's. If I were to permit that to one creditor the same thing might be done by every creditor under the liquidation, who, either thinking that the best was not being done, or feeling in some way aggrieved, might indulge in this luxury, not for the benefit of all the creditors, but would have witnesses summoned for examination from any part of the country, and harass them by examination before the Court for any number of hours."

Nicholson & Co. appealed. Notice of the appeal was served on the trustee.

Creed (*Robinson*, Q.C., with him), for the Appellants:—

Though sect. 96 only expressly gives the right to make such an application to the trustee, rule 171 implies that it may be made by other persons (1). In *Ex parte Austin* (2) a subpœna for the examination of a witness was issued at the instance of the bankrupt himself. Under sect. 197 of the *Bankruptcy Act* of 1849, it was held to be almost a matter of course that such an application should be granted: *Ex parte Alexander* (3). In *Cooper* v. *Harding* (4), a case under sect. 33 of 6 Geo. 4, c. 16, the Court expressed an opinion that for the granting of the summons to bring before a Commissioner a person "suspected" of having property of the bankrupt in his possession, the suspicion required was that of a party applying for the summons and not of the Commissioner.

(1) Sect. 96 provides that "The Court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property."

Rule 171: "Every application to the Court under sect. 96 of the *Bankruptcy Act*, 1869, shall be in writing, and shall state shortly the grounds upon which the application is made, and where the application is not made on behalf of the trustee, the grounds upon which the application is made shall be verified by affidavit."

(2) 4 Ch. D. 13.

(3) 1 D. J. & S. 311.

(4) 7 Q. B. 928.

No doubt if a creditor makes the application, he must shew some case for the examination, and this the Appellants have done. The debtor has no right to complain of being harassed. The powers conferred by sects. 115, 138 of the *Companies Act*, 1862, are analogous, and in *In re Gold Company* (1), *Jessel*, M.R., said (2): "It is not necessary to make out a *primâ facie* case—the probability of a case is enough." The only object of serving the trustee with notice of the application is to ascertain whether he is willing to take up the matter himself. He has no other interest in it. The Registrar was wrong in thinking that it was necessary for us to shew that the trustee had interests adverse to those of the creditors. It is not suggested that we are actuated by any improper motive.

Winslow, Q.C., and *H. Reed*, for the trustee, were not heard.

JAMES, L.J.:—

This is, as it appears to me, an appeal from the exercise of the judicial discretion of the Registrar. I quite agree with the observations which he made. It would be a sad, a monstrous thing if any one who claimed to be a creditor of a bankrupt was entitled *ex debito justitiæ* to summon for examination anybody whatever whom he might wish to examine as to the estate and the dealings of the bankrupt. I do not see where the end of it would be. As it stands, sect. 96 is inquisitorial enough. The trustee fills a responsible position. But when some other person makes the application, the Court ought to consider whether there is any reasonable probability of the examination resulting in a benefit to the estate, and whether it is reasonable to summon witnesses for examination from any distance. If the trustee declines to make the application, that is not a conclusive reason for refusing if made by a creditor, provided that the creditor makes out a *primâ facie* probability that some benefit will result to the estate from the examination. But that probability ought to be established to the satisfaction of the Court before any one, other than the trustee, is allowed to put in force this powerful process of the Court. The Registrar was of opinion that this

(1) 12 Ch. D. 77. (2) 12 Ch. D. 84.

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probability had not been shewn, and I am bound to say that I cannot understand what it is which is alleged. It is not suggested that the bill of sale was a fiction or a fraud. It is only alleged that it included the whole of the debtor's property. The Registrar has come to the conclusion, and I can see no ground for differing from that conclusion, that the Appellants have not shewn a reasonable probability that any benefit will result to the estate from the proposed examination. I agree that the trustee has no interest in the matter except for the purpose of saying whether he will take it up himself. He stands in the position of an *amicus curiæ*, and I do not see why he should have filed any affidavits.

BRETT, L.J.:—

The argument for the Appellants has been very forcibly put. But the necessary logical result of it is that any creditor who has a suspicion about the debtor's dealings or property has an absolute right to such an examination. That necessary logical result convinces me that the argument is wrong. The Court has a discretion in the matter, and, if no reasonable probability is shewn of any good resulting to the estate or to the creditors, the application ought to be refused. I cannot see that any such probability has been shewn in the present case.

COTTON, L.J.:—

I am of the same opinion.

Creed:—We ought not to pay the costs of the affidavits which the trustee has filed.

H. Reed:—The notice of motion asked that the costs of the application might be provided for. The trustee was bound to protect the estate.

JAMES, L.J.:—The application has failed, and we can only dismiss it with costs.

Solicitors for Appellants: *Nash & Field.*
Solicitors for Trustee: *Layton, Son, & Lendon.*

LAWRIE *v.* LEES.

[1877 L. 63.]

C. A.
1879
V.-C. H.
July 24.
C. A.
1880
April 8.

Lunatic—Execution of Lease by Committee—Sale of Leaseholds—Vendor and Purchaser—Conditions of Sale—Continuing Breach of Covenant.

By an order in lunacy the committees of Sir *H. M.* were empowered, with the sanction of the Masters in Lunacy, in the name and on behalf of Sir *H. M.*, to concur in all deeds affecting any hereditaments belonging to the firm in which Sir *H. M.* was a partner which should have been executed by the other partners. By a deed expressed to be made between Sir *H. M.* by *A. B.* and *C. D.*, his committees, and *D. C. M.* and *R. B.* (the said Sir *H. M.*, *D. C. M.*, and *R. B.*, carrying on business in co-partnership, and thereinafter called the lessors) of the one part, and a lessee of the other part, the lessors (the said Sir *H. M.* acting by the said *A. B.* and *C. D.* as such committees as aforesaid) demised the property to the lessee. The testimonium clause was, "In witness whereof the parties to these presents have hereunto set their hands and seals . . ." *A. B.* signed his name against one seal and *C. D.* against another, and the attestation clause was "Signed, sealed, and delivered by the within named *A. B.* and *C. D.* in the presence of," &c. :—

Held, by the Court of Appeal, reversing the decision of *Hall*, V.C., that the lease was well executed on behalf of Sir *H. M.*

A lease contained a covenant on the part of the lessee that he would not carry on or permit to be carried during the term on any part of the demised premises any trade or business except that of a licensed victualler without the license of the lessors, and there was a clause of re-entry for breach of covenant. The lessee underlet parts of the property to persons who carried on other trades there. The lessors with knowledge of this went on receiving rent. The property was put up for sale under a condition that the production of the last receipt for rent should be conclusive evidence of the performance of the covenants or waiver of any breaches of them up to the time of completion. In an action for specific performance, a reference as to title having been directed :—

Held, by the Court of Appeal, that the condition was binding, and that the purchaser was bound to accept the title notwithstanding the breaches of covenant :

Held, also, that the question whether, assuming the breach to be a continuing breach such as to render the purchaser liable to be evicted immediately after completion, notwithstanding any waiver up to completion, a

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Court of Equity would force the purchaser to accept the title, was a question to be decided at the trial, and not on a reference as to title.

Per Bramwell, L.J.:—Whether the decision in *Walrond* v. *Hawkins* (1) is applicable to a case where the covenant is simply not to permit the property to be used in a particular way, *quære*.

THIS was an action by a purchaser to set aside a contract, dated the 20th of February, 1877, for purchase of a leasehold public-house, or in the alternative to have the contract rectified, and to have an inquiry as to the title, and an abatement from the purchase-money on account of dilapidations. The Defendant by counter-claim insisted on specific performance. At the trial on the 3rd of December, 1878, the Court dismissed so much of the claim as sought to set aside the contract, and directed inquiries whether a good title could be made, and if so, when it was first shewn that such good title could be made, and the Plaintiff was ordered to pay the costs up to and including the hearing.

Under the inquiries the Plaintiff took two objections to the title—1, that the lease was not duly executed, and, 2, that it had become voidable by reason of breach of covenant.

The public-house in question belonged to the firm of *Meux & Co.*, brewers, the senior partner in which, Sir *H. Meux*, Bart., was of unsound mind, and Lord *Ernest Bruce* and Viscount *Malden* were the committees of his estate. By an order of the Lords Justices made on the 26th of April, 1867, in the matter of the lunacy, it was, among other things, ordered that Lord *Ernest Bruce* and Viscount *Malden*, as the committees of the estate of Sir *H. Meux*, should be at liberty, with the approbation of the Masters in Lunacy, and in the name and on the behalf of the said Sir *H. Meux*, to concur in and execute the counterpart of a certain lease, and also from time to time, with the like approbation, in the name and on the behalf of the said Sir *H. Meux* to concur in and execute all such other deeds and instruments affecting any messuages, buildings, or hereditaments then belonging to the partnership business of the brewery, or held or taken in connection therewith, or which at any time or times thereafter should belong to the said partnership, or be held, taken, or acquired in, or agreed to be held, taken, or acquired in, connection therewith or for the

(1) Law Rep. 10 C. P. 342.

purposes thereof, as should be required from time to time for the due and necessary management of the partnership business during the continuance of the unsoundness of mind of Sir *H. Meux*, and as should have been previously executed by the partners of Sir *H. Meux* in the brewery.

The lease in question, dated the 12th of December, 1868, was expressed to be made between Sir *H. Meux*, Bart., a person of unsound mind so found by inquisition, by Lord *Ernest Bruce* and Viscount *Malden*, the committees of his estate, and Sir *D. C. Marjoribanks* and *R. Berridge*, both of the *Horse Shoe Brewery, Tottenham Court Road* (the said Sir *H. Meux*, Sir *D. C. Marjoribanks*, and *R. Berridge*, carrying on business as brewers in co-partnership under the style or firm of *H. Meux & Co.*, and thereinafter called the lessors), of the one part, and *F. H. Miller* of the other part. It recited the order of the 26th of April, 1867, and that the concurrence in and execution of the lease by Lord *Ernest Bruce* and Viscount *Malden* as committees had been approved by the Masters in Lunacy as appeared by the signature of Master *Barlow* in the margin, and it was witnessed that, in consideration of £200 paid by *Miller* to *Marjoribanks* and *Berridge* for the use of the firm, they the said lessors (the said Sir *H. Meux*, acting by the said Lord *Ernest Bruce* and Viscount *Malden* as such committees,) demised the *White Bear Inn* and some adjoining property to the lessee for the term and at the rent therein mentioned. There was a covenant on the part of the lessee that the lessee, his executors, administrators, and assigns, would keep open and use the *White Bear Inn* for the purposes of the trade or business of a licensed victualler according to the usual practice of publicans, and also during the term use the yards, coach-houses, stables, and other appurtenances to the said *White Bear Inn*, as and for yards, coach-houses, stables, and appurtenances to the said *White Bear Inn*, and for the convenience of the business carried on therein, and would not carry on, or permit or suffer to be carried on, during the said term, on any part of the demised premises, any trade or business whatsoever other than above mentioned without the special license and consent of the lessors, their executors, administrators, or assigns, first had and obtained in writing for that purpose. There was the usual proviso for re-entry on non-

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payment of the rent or non-performance of the covenants on the part of the lessee.

The testimonium clause ran in the usual form: "In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written." Lord *Ernest Bruce* signed his name close to one seal and Viscount *Malden* close to another, and the attestation was "Signed, sealed, and delivered by the within named Lord *Ernest Bruce* and Viscount *Malden* in the presence of *John Hunter*, 9, *Lincoln's Inn*."

The purchaser objected that this was not a due execution of the lease on behalf of Sir *H. Meux*.

The breaches of covenant relied on by the purchaser were that part of the premises had been underlet to a person who carried on there at the time of the sale the business of a coachbuilder, and that another part had been underlet to a person who carried on there the business of a flymaster till after the date of the contract, though he had since ceased to do so, and another part was let as a private stable.

The contract was indorsed on particulars and conditions which had been prepared for a sale by auction, and which shewed the fact that the above parts of the property had been underlet as above mentioned. The conditions provided that "The production of the last receipt for rent paid shall be taken as conclusive evidence of the due and satisfactory performance of the lessee's covenants contained in the lease by which the premises are held, or the waiver of any breaches of the same covenants up to the time of the completion of the purchase, whether the lessor shall be cognizant of such breaches (if any) or not."

The contract also contained this provision: "The property is presumed to be correctly described, but as the lease will be produced at the sale and the premises may be viewed, no error, misdescription, or omission in the foregoing particulars shall annul the sale, and no compensation or equivalent shall be required for any such error, misdescription, or omission, and the purchaser shall be deemed to have bought with full notice of the contents of the lease sold and of the state of the property."

No written consent to the carrying on of the businesses of coachbuilder and flymaster on the premises had been given by

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the lessors, but they had received rent with notice of the state of occupation of the property.

The Chief Clerk of Vice-Chancellor *Hall* certified that a good title had not been shewn, and the action came on upon further consideration, and a summons by the Defendant to vary the certificate, on the 24th of July, 1879.

Northmore Lawrence, for the Defendant, contended that there was enough to shew in what capacity Lord *Ernest Bruce* and Viscount *Malden* acted; that one of the seals must be taken to be Sir *H. Meux's* seal, and the committees signed the lease in obedience to the order of the Court; that what the committees did was clearly within the authority given them by the order of 1867, and it was a perfectly good and valid execution by them.

[During the argument the case of *Phillipson* v. *Gibbon* (1) was referred to.]

Joseph Beaumont, for the Plaintiff, submitted that the signatures were not in proper form, and referred to *Pope* on the Lunacy Laws (2), General Orders, 1853–54, *Bacon's* Abr., Leases (3), and *Moore's* Reports (4).

HALL, V.C.:—

I shall not make an order that the purchaser shall take a title which depends upon the facts of this case. I cannot make him take the title, legal or equitable, which depends upon them, notwithstanding that the Court disposed of the question of the contract and made a decree for the specific performance of it. I consider that the lease is bad at law. I think that the lease may be disputed by Sir *H. Meux*, and by those claiming under him. I think that Sir *H. Meux* could recover in an action of ejectment on the ground of wrongful possession, and therefore I think that the purchaser is not bound to take the title. It appears to me that the lease was not executed in proper form, viz. *Henry Meux*, by so-and-so, his committees. The summons must be dismissed.

C. A.

The Defendant appealed. The appeal was heard on the 8th of April, 1880.

(1) Law Rep. 6 Ch. 428.
(2) Page 161.
(3) I. 10, p. 785.
(4) Page 71, par. 19.

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Davey, Q.C., *Freeling*, and *Northmore Lawrence*, for the Appellant:—

As regards the execution by the committees, we say that the Vice-Chancellor was misled by the analogy of powers of attorney. There is nothing here to shew that one of the seals is not Sir *H. Meux's* seal. Lord *Ernest Bruce* and Viscount *Malden* were the proper persons to affix that seal and deliver the deed as his. Signature is not necessary, they only sign by way of verification. If there had been only one seal instead of two there would have been no arguable objection. They did not sign expressly as committees, but the frame of the deed shews that they were acting in that capacity only. The case of powers of attorney is quite different, but even there the form of words is not material if it appears that the attorney seals and delivers for the principal: *Wilks* v. *Back* (1). *Frontin* v. *Small* (2) was cited against us below, but is not applicable; there the attorney purported to demise, here Sir *H. Meux* purports to demise. One seal may serve for two people: *Ball* v. *Dunsterville* (3); *Sheppard's* Touchstone (4); and the presence of a superfluous seal cannot invalidate the execution. Then, as regards the forfeiture, that is sufficiently guarded against by the condition: *Bull* v. *Hutchens* (5). Moreover, the lessors having acquiesced in the letting to the undertenants, the purchaser must be entitled to a reasonable time to get rid of them. It has been decided that where a landlord receives rent after notice of an underletting for a year in breach of covenant, there is no continuing breach of which he can avail himself during the remainder of the year: *Walrond* v. *Hawkins* (6).

Horton Smith, Q.C., and *J. Beaumont*, for the Plaintiff:—

The committees have no estate, and must act strictly according to the powers given to them. They are to concur in deeds "in the name and on the behalf of" Sir *H. Meux*. The seal and signature ought, therefore, to be those of Sir *H. Meux;* here each committee signs his own name and affixes his own seal. The execution ought to be in the name of the lessor: *Bac.* Abr., Leases (7);

(1) 2 East, 141.
(2) 1 Stra. 705; 2 Ld. Raym. 1418.
(3) 4 T. R. 313.
(4) Page 57.
(5) 32 Beav. 615.
(6) Law Rep. 10 C. P. 342.
(7) I. 10.

Moore's Reports (1); *White* v. *Cuyler* (2); *Wilks* v. *Back* (3); *Pope* on Lunacy (4). We contend, therefore, that the Vice-Chancellor rightly held the lease not to have been duly executed. Then, as to the other objection, it is not disputed that there has been a breach of covenant. It is a continuing breach for which, after completion, the purchaser would be liable to eviction. *Howell* v. *Kightley* (5) is a decisive authority that in such a case a condition such as that relied on here is no answer to the objection.

[JAMES, L.J.:—The Master of the Rolls seems to me to have decided only that a vendor who committed a wilful breach of covenant after the contract could not avail himself of the condition.]

Bull v. *Hutchens* (6) was not much argued on this point, and *Howell* v. *Kightley* was not referred to. A condition is fraudulent and misleading if it binds the purchaser to assume what the vendor knows to be untrue: *In re Banister* (7). Conditions will be construed strictly against the vendor: *Smith* v. *Robinson* (8). Here the condition and particulars are misleading. It is put prominently forward that parts of the property were underlet, and the purchaser had a right to assume that they were underlet with license.

Davey, in reply:—

[BRAMWELL, L.J.:—I think the condition precludes the purchaser from objecting to breaches up to the time of completion, but will a Court of Equity compel him to take a lease which may be forfeited on the day after completion by reason of a continuing breach of covenant?]

The answer is twofold; first, he has agreed to take a title with this infirmity; secondly, the objection is too late; it is an objection to specific performance, not to title, and ought to have been decided upon at the hearing.

[JAMES, L.J.:—The reference is generally whether a good title can be shewn?]

(1) Page 71, par. 19.
(2) 6 T. R. 176.
(3) 2 East, 141.
(4) Page 161, note *z*.
(5) 21 Beav. 331.
(6) 32 Beav. 615.
(7) 12 Ch. D. 131.
(8) 13 Ch. D. 148.

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That means a good title according to the conditions: *Upperton* v. *Nickolson* (1).

JAMES, L.J.:—

I am of opinion that the objections to the title cannot be sustained. In the first place I will deal with the objection that the deed is not the deed of Sir *Henry Meux*, but is the deed only of the committees, or, rather, the deed of nobody, because, according to the contention before us, the seals and signatures of the committees, who are not parties to the deed, would be seals and signatures of mere strangers. I am of opinion, looking at the whole instrument and at who are the parties and who are the persons whose seals are said to be affixed to it, that it is the deed of Sir *Henry Meux*. First of all, the committees do not profess to be parties, the deed being made between Sir *Henry Meux* by his committees, his partners, and the lessee. Then, in the demising part, the lessors, that is, Sir *Henry Meux* and his partners (Sir *Henry Meux* acting by his committees), demise. Then the testimonium is: "In witness whereof the parties to these presents have hereunto set their seals;" that is in testimony whereof the said Sir *Henry Meux* and his partners, whatever their names are, have affixed their seals, and the said Sir *Henry Meux* acts by his committees, who are described as such throughout the deed. It seems to me that it would be adopting a strained construction for the purpose of making persons act contrary to their intention if we were to hold that the committees were acting in their private character, and professing to execute a deed as their deed when there was no deed to which they were parties in any sense whatever. It has been settled, and it is not for us to question the propriety of that decision, that where an attorney describes himself as an attorney, and professes to grant as an attorney and executes as an attorney, but does not execute in the name of and on behalf of his principal, that is a bad execution. That is not the case we have before us. Suppose this lease had been simply a lease by Sir *H. Meux* of his own separate property, he acting by his committees, and had been executed in the solicitor's office or in the house of one of the committees, and the seal put on with

(1) Law Rep. 6 Ch. 436.

these words, "In witness whereof the said parties to these presents have hereto set their seals," or, "In witness whereof the said Sir *Henry Meux* has hereto set his seal," the committees might then go to the lessee and, without using any special form of words, say, "There is your lease." That would be quite sufficient, and it would not be open for anybody to say that there was not a good delivery by the committees in their character of committees, or that, when the seal was affixed to the deed, something was said which would control the effect of what took place when the lease was handed over to the lessee. The lessee would have a right to say, "You Sir *Henry Meux* by your committees gave me that instrument as your deed," and what took place would be quite sufficient to make it his deed.

Then upon the second point, it seems to me that we are bound to hold that the purchaser had notice of the contents of the lease. It is an express term of the agreement that the purchaser shall be held to have notice of the contents of the lease, and the reference to the production of the lease in the auction-room does not control those words. Such a stipulation is always inserted, otherwise the purchaser might contend that there were burdensome covenants in the lease to which he was not obliged to submit, and the purchaser therefore has notice of the covenants, including the covenant that the property shall not be underlet without leave and consent. He has notice also on the face of the particulars that the property has been underlet. It is true that he has not notice that it has been underlet without written consent, but he has notice of the fact that it has been underlet, and of the covenant that it shall not be underlet without written consent. That being so, there is a condition that the last receipt for the rent shall be conclusive evidence that all the covenants have been performed or the breaches thereof waived up to the time of the completion of the purchase. It appears to me that the very object of that condition is to prevent difficulties arising from what are called continuing breaches, and accordingly the late Master of the Rolls, in *Bull* v. *Hutchens* (1), held that under that condition the last receipt for rent ought to be treated as conclusive evidence that the breaches had either not been committed or had been

(1) 32 Beav. 615.

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effectually waived up to the time of the completion. It appears to me that we ought to act on the same view, and hold the purchaser bound by his agreement to assume that the covenants have been kept or the breaches so condoned as not to affect the title.

Another view of the case has been suggested, namely, that although the title is to be held good, there are circumstances that make it inequitable to force it upon the purchaser. It has been urged that in the case of a continuing breach the lessor, though he had not up to that time insisted on a forfeiture, might do so on the day after completion. That, however, is not a question upon title, but a question upon the right to specific performance of the contract, and was one of the points to be decided at the trial, not on a reference as to title. It is not to be held that this condition is inoperative in every case where there is what is called a continuing breach. The real intent and meaning of the condition is, that there is to be no objection by reason of any breach of covenant. It may be said to be a hard bargain, but the purchaser has chosen to enter into it, and no mischief practically arises in these cases, because lessors, especially as regards property of this kind, are only too glad to get people to occupy their houses and pay rent. I think that this condition is binding, and that the purchaser is bound by the conditions to accept the title.

BAGGALLAY, L.J.:—

A decree having been made upon the counter-claim of the Defendant for the specific performance of an agreement entered into in February, 1877, for the sale by the Defendant to the Plaintiff of certain leasehold premises, and a reference in the ordinary form to inquire whether the Defendant could make a title to the premises sold, two objections to the title have been raised. The property formed a portion of the partnership estate of Sir *Henry Meux & Co.* One objection was that the lease was not so executed as to bind the estate of Sir *Henry Meux*, and the second was that there had been a breach of the covenants contained in the lease for which there had been no license given and in respect of which there had not been any waiver.

Now, as regards the first of these two objections, it was hardly disputed by Mr. *Horton Smith* that if the lease had been indorsed, "signed, sealed, and delivered by Lord *Ernest Bruce* and Viscount *Malden*, acting for and on behalf of Sir *Henry Meux*," it would have been perfectly correct. But the whole of the deed must be read together, and when I find that instead of having the statement in the attestation clause that they are acting for and on behalf of Sir *Henry Meux*, that statement is found within the body of the deed, I can come to no other conclusion but that this was a deed perfectly valid to bind the estate and interest of Sir *Henry Meux* in the property the subject of the demise.

The second objection is that there have been certain breaches of the covenants contained in this deed as to which there was no license and no waiver. It appears that an underlease has been granted of a portion of this property at a yearly rent of £25 to a coachbuilder, and of another portion at a rent of £30 a year to another person carrying on the business of a flymaster, and another portion is let as a private stable for £8 per annum. These circumstances are mentioned on the face of the conditions of sale upon which the contract between the parties is indorsed. It is not disputed that the particular lettings to which I have referred were breaches of the covenants, but reliance is placed upon the condition making the production of the last receipt for rent conclusive evidence of the performance of the lessee's covenants, or the waiver of any breaches of them, up to the time of the completion of the purchase.

The purchaser contends that, under the circumstances of this case, the vendor is not entitled to have the benefit of this very clear and distinct condition. The Appellants, in opposition to this contention, refer to *Bull* v. *Hutchens* (1), which appears to be precisely in point, and only to differ from the present case in not being so strong a case in favour of enforcing the condition as against the purchaser. On the other hand, Mr. *Horton Smith*, who insists that the breaches in the present case are continuing breaches, has pressed upon us the case of *Howell* v. *Kightley* (2), in which he says that, although the Master of the Rolls was prepared to allow and give full effect to the condition as far as regards a breach of the cove-

(1) 32 Beav. 615. (2) 21 Beav. 331.

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nant down to the date of the contract, he refused to extend the benefit of it to breaches committed subsequently to the contract. I think that there is no necessary conflict between the decision in that case and the decision in *Bull* v. *Hutchens* (1). In *Howell* v. *Kightley* (2) there had been a breach of covenant committed by the vendor within three or four days after he had entered into the contract, and the Master of the Rolls said that he had to consider whether that was not conduct on the part of the vendor which would justify the Court in depriving him of the benefit of the condition. That case went on appeal to the Lords Justices on another point (3), and I think Lord Justice *Knight Bruce* considered that the Master of the Rolls was right, but it is quite a different case from *Bull* v. *Hutchens*. I think that *Walrond* v. *Hawkins* (4) has an important bearing on this part of the case, because it is admitted that the lessors had full notice of, and were consenting parties to, the several underleases to which I have referred. They not only had particular notice of them, but knew that they were breaches which must of necessity continue in force until the expiration of the terms for which the underleases were granted respectively. I think, then, that the observations of Lord *Coleridge* in *Walrond* v. *Hawkins* are applicable, and that the breaches were not continuing breaches, but single breaches, which had been waived. I think, therefore, that the condition of sale is a complete answer to the second objection as regards the title.

BRAMWELL, L.J.:—

I am of the same opinion. As to the first point the case stands thus. The instrument purports to be between the other partners and Sir *Henry Meux* by his committees and the lessee, and it proceeds as it ought to proceed if Sir *Henry Meux* had been actually a party to it, and it concludes by saying, "In witness whereof the parties to these presents have hereunto set their hands and seals," and there are affixed the seals of the other two lessors, and the seal of the lessee, and seals which may be the seals of Sir *Henry Meux*. The deed has been delivered to the lessee as the lease, and we are invited to say that those seals are not the

(1) 32 Beav. 615.
(2) 21 Beav. 331.
(3) 8 D. M. & G. 325.
(4) Law Rep. 10 C. P. 342.

seals of Sir *Henry Meux*. I have heard no reason why we should say so, except a sort of surmise that, as there were two committees, they must have supposed they were affixing their own seals instead of the seals of Sir *Henry Meux*, in fact, that they were putting the wrong seal instead of the right one, although they have said they put the right one. It appears to me that the lease has been sealed twice on behalf of Sir *Henry Meux* by there being the signatures of the two committees, and that we ought to hold the seals to be what they are stated presumably in the instrument to be, that is to say, the seals of Sir *Henry Meux*. In addition to that, this would be a case of estoppel. If a man delivered an instrument as a deed, he could not say the deed is not mine, nor could it be said by Sir *Henry Meux*, supposing him to become sane, that these were not his seals, the deed having been sealed by those authorized so to do.

Now as regards the other point, with all respect to those who think otherwise, I am of opinion that a bargain is a bargain, and should be observed, and that as this purchaser has agreed that he will take an arbitrary substitute in lieu of evidence, or will not require evidence that the covenants have been performed, or if not performed, that they have been waived, he ought to be held bound by that agreement. But it occurred to me that it might be unreasonable to make him take a conveyance and pay the purchase-money when all he would get would be a lease that might be avoided the day after he became possessed of it. Suppose there had been a covenant to do a thing by a particular day which had not arrived, and which could not possibly be performed by the time appointed, I doubted whether a Court of Equity would, under the circumstances, compel the purchaser to take a conveyance and pay his money. But in addition to the reasons which have been given, there appears to be one which ought to make the condition binding in this case. If such a difficulty as that which I have suggested could prevail, the condition in question would really be a nugatory stipulation, because the great majority of covenants are of such a character that a continuing breach may be committed *de die in diem*. It would be idle to say you shall not require proof that the covenants have been performed, or you shall be content to admit that if they have not been performed

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they have been waived, if the purchaser could say "I am just as well off as though that clause was not there, because I am at liberty to say that if I complete I may be turned out the next day by reason of a continuing breach, the continuance of which I cannot prevent immediately after my purchase." I think, therefore that the purchaser ought not to be at liberty to set up such, a case. I cannot say, for my own part, that it may not be his fate here to be turned out, for I see a distinction (whether well founded or not) between this case and *Walrond* v. *Hawkins* (1). The covenant in that case was that the lessee was not to assign or demise to or permit any other person to occupy the premises or any part thereof without the consent of the lessor. What the Court of Common Pleas said was this, "What the lessee has done is a demise, and it is a breach of the covenant not to demise, but the lessor has elected not to treat it as a breach or forfeiture, and he cannot say also that the lessee has broken the other covenant that he would not permit any other person to occupy." That decision seems to me not applicable to the present case. Here there is no covenant not to demise, but a covenant that the lessee will not permit the use of the premises in a particular way. If he has granted an underlease to a person who has used the property contrary to the covenants, I am not sure that this will not be held to be a continuing breach of the covenant which will make him liable to eviction. I think, however, that it is unnecessary to decide that, for the other reasons which have been given, and the reason which I prominently mentioned, that a stipulation of this sort would be nugatory if such an objection could be allowed. I am of opinion that the objections to the title cannot be sustained.

Solicitors: *C. F. Yorke; Hunters, Gwatkin, & Haynes.*

(1) Law Rep. 10 C. P. 342.

C. A.
1880
April 9.

In re THOMSON'S ESTATE.
HERRING *v.* BARROW.

[1878 T. 94.]

Will—Construction—Life Estate—Power of Appointment.

A testator by his will gave all his property to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease, should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons:—

Held (affirming the decision of *Hall*, V.C.), that the widow had no power to dispose of the property by will, and that on her death it went to the ulterior takers named in the husband's will.

Whether she took anything more than a life estate with a right to enjoy the property in specie, *quære*.

THIS was an appeal by the Plaintiffs from a decision of Vice-Chancellor *Hall* (1).

Hastings, Q.C., and *Caldecott*, for the Appellants:—

We contend that the widow took an absolute interest under the will: *Bull* v. *Kingston* (2); *Perry* v. *Merritt* (3); *Henderson* v. *Cross* (4); *Bradly* v. *Westcott* (5). But if the gift does not amount to an absolute interest, then we say that the widow had an unlimited power of disposition by deed or will. "Remaining" cannot refer to a physical remaining, but must mean whatever is unaffected by any disposition made by the widow. He does not say "should there be anything remaining at her death," and he can hardly be considered to have been thinking of the leaseholds running out. The words "for her own use and benefit" cannot confine the power to act *inter vivos*, for a testamentary power of disposition may often be exercised so that the donee of the power receives a benefit. *Scott* v. *Josselyn* (6) and *Pennock* v. *Pennock* (7)

(1) 13 Ch. D. 144.
(2) 1 Mer. 314.
(3) Law Rep. 18 Eq. 152.
(4) 29 Beav. 216.
(5) 13 Ves. 445, 451.
(6) 26 Beav. 174.
(7) Law Rep. 13 Eq. 144.

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are in favour of a life estate with a general power of appointment by deed or will.

W. Pearson, Q.C., and *Rawlins, contrà*, were not called upon.

JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor must be affirmed. If there is one thing clearer than another in the case, it is that the testator intended his own will, and not that of his wife, to be that by which the destination of his property was to be determined. The Vice-Chancellor was of opinion that the widow took no further estate than a life estate, and that at most she had no further power of disposition than by act *inter vivos*. At her decease, should there be anything remaining, the testator gives it over. What remained was what she was in enjoyment of at her death, and why should not the gift have effect? My own strong inclination of opinion is that the widow took nothing but an estate for life with a full power of enjoying the property in specie, so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie. It is, however, unnecessary to decide that. It is only necessary to say that to my mind the testator clearly did not intend to give her any power of disposition by will.

BAGGALLAY, L.J.:—

I also am of opinion that the widow had no power of testamentary disposition, and am disposed to agree with the Lord Justice *James* that she took nothing but a life estate with a right to enjoy the property in specie.

BRAMWELL, L.J.:—

I am of the same opinion.

Solicitors: *Thomson & Edwards; Brownlow & Howe.*

Ex parte BUTTERS. *In re* HARRISON.

C. A.
1880
April 15.

Court of Bankruptcy—Jurisdiction—Time for taking Objection—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.

The trustee in a bankruptcy applied to a County Court to set aside as fraudulent a mortgage which the bankrupt had executed. The Court directed the trial of certain issues by a jury, and the jury found that the deed was executed by the bankrupt without consideration, and with intent to defeat and delay his creditors. The County Court then declared the deed to be void, and ordered it to be delivered up to be cancelled. The mortgagee applied for a new trial, but the application was refused. He appealed to the Chief Judge from the order which declared the deed void, but did not appeal from the refusal of a new trial. On the hearing of the appeal, the objection was taken that the case was not one in which the Court of Bankruptcy ought to exercise its extraordinary jurisdiction under sect. 72:—

Held, that the objection was raised too late after the mortgagee had taken his chance of a decision in his favour on the merits in the County Court.

Ex parte Swinbanks (1) followed.

Decision of *Bacon*, C.J., reversed.

Held, also, that, as there had been no appeal from the refusal of a new trial, the finding of the jury on the issues was conclusive, and the order declaring the deed void followed as a necessary consequence.

THIS was an appeal from a decision of *Bacon*, C.J. (2).

The facts were briefly as follows:—

T. G. Harrison was adjudicated a bankrupt in the *Hanley* County Court on the 16th of June, 1874. On the 27th of November, 1878, the trustee in the bankruptcy applied to the Court for an order declaring void as fraudulent a memorandum, dated the 30th of April, 1873, of deposit of certain deeds by the bankrupt with his son by way of mortgage, and a mortgage deed dated the 8th of May, 1873, executed by the bankrupt in favour of his son. The Court directed the trial by a jury of certain issues as to the validity of the memorandum and the deed, and on the 20th of June, 1879, the issues were tried, and the jury found that the memorandum and the deed were fraudulent, and that they were both executed by the bankrupt without consideration, and with intent to defeat and delay his creditors. On the 26th of June the mortgagee gave notice of motion for a new trial. On the 10th of

(1) 11 Ch. D. 525. (2) 13 Ch. D. 603.

C. A. 1880 *Ex parte* BUTTERS. *In re* HARRISON.

July the Registrar made an order declaring the memorandum and the deed void, and directing the mortgagee to deliver them up to be cancelled. On the 5th of August the Judge refused the motion for a new trial. The mortgagee appealed to the Chief Judge from the order declaring the memorandum and the deed void, but he did not appeal from the refusal of a new trial. On the hearing of the appeal the objection was taken that the case was not one in which the Court of Bankruptcy ought to have exercised its extraordinary jurisdiction under sect. 72, but that it ought to have been left to the determination of the ordinary tribunal. The Chief Judge allowed the objection, and discharged the order appealed from.

The trustee appealed.

E. Cooper Willis, and *Finlay Knight*, for the Appellant:—

If the objection to the exercise of the jurisdiction is well founded, it is too late to raise it after the Appellant has taken his chance of a decision in his favour on the merits: *Ex parte Swinbanks* (1). But, in truth, the case is one in which the trustee is asserting a higher and better title than that of the bankrupt himself, and in such a case the Court of Bankruptcy ought to exercise the jurisdiction which it clearly has under sect. 72: *Ex parte Brown* (2). *Ex parte Stephens* (3) shews that the deed is void.

[JAMES, L.J., referred to *Ex parte Anderson* (4); *Morley* v. *White* (5).]

Winslow, Q.C., and *Robson*, for the mortgagee:—

The Chief Judge had all the facts before him and thought that the case was not a proper one for the exercise of the jurisdiction. In fact he raised the objection himself. In *Ex parte Dickin* (6) the Court of Appeal itself took the objection, and allowed the appeal on that ground. We do not admit that the objection was not taken in the County Court.

[JAMES, L.J.:—If it was, you ought to have appealed at once, without waiting till the issues had been tried.]

Ex parte Dickin was recognised and approved in *Ex parte*

(1) 11 Ch. D. 525.
(2) Ibid. 148.
(3) 3 Ch. D. 807.
(4) Law Rep. 5 Ch. 473.
(5) Ibid. 8 Ch. 214.
(6) 8 Ch. D. 377.

Swinbanks (1). The Court is not in a position to say whether it should exercise its jurisdiction until it knows all the facts of the case.

JAMES, L.J.:—

I am of opinion that this case is entirely governed by *Ex parte Swinbanks*. I by no means desire to express an opinion that the Court of Bankruptcy ought not to entertain a question arising under the statute of *Elizabeth*. The bankruptcy law puts the trustee in the position of the representative of all the creditors of the bankrupt, and under the statute of *Elizabeth* creditors have a right to impeach transactions which the bankrupt himself could not impeach. The trustee, therefore, in seeking to set aside a transaction as fraudulent under the statute of *Elizabeth* is claiming by a higher and better title than the bankrupt himself, for the bankrupt is a party to the fraud. But it is not necessary to determine whether in such a case the Court of Bankruptcy ought to assume jurisdiction over a stranger to the bankruptcy, for, even if a stranger has a right to have the case determined by another tribunal, yet if the trial of an issue is directed by the Court of Bankruptcy, and the issue is tried, he cannot be allowed to take his chance of a decision in his favour on the merits, and then, if the decision is against him, to raise an objection to the exercise of jurisdiction by the Court of Bankruptcy. He cannot be allowed to say to the trustee, Heads I win, tails you don't win. I repeat what was said by all the Judges in *Ex parte Swinbanks*, that where the Court has jurisdiction, and the only question is whether it ought to exercise it, the objection to its exercising it ought to be taken at the earliest possible opportunity. I can see no reason why the question in dispute should not have been just as well tried by a jury summoned by the Court of Bankruptcy as by a jury at the assizes. But the present question is determined by *Ex parte Swinbanks*.

BAGGALLAY, L.J.:—

I am of the same opinion. If the objection had been that the

(1) 11 Ch. D. 525.

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Ex parte BUTTERS. *In re* HARRISON.

Court of Bankruptcy had no jurisdiction, it would be difficult to imagine any state of circumstances in which it would be too late to raise it. But it is admitted that the Court had jurisdiction, and it is said that the case was not one in which under ordinary circumstances the Court should have exercised the jurisdiction. The Court, however, did exercise it, and it was too late, after the Appellant had taken his chance of a determination in his favour in this forum, for him to raise the objection that the jurisdiction should not have been exercised. *Ex parte Swinbanks* (1) is conclusive.

BRAMWELL, L.J. :—

I am entirely of the same opinion, and for the same reasons. It is admitted that the Court had jurisdiction, but it is said that it ought not to have exercised it. I will assume that it ought not. But it did exercise it. Either the Respondent consented to the exercise of the jurisdiction, or he did not. If he consented, of course he is bound; if he did not consent, he ought to have appealed at once from the order which directed the trial of the issues. It would be strange if he could object to the exercise of jurisdiction if the decision went against him, and yet the trustee should be bound by it if the decision was adverse to him.

E. Cooper Willis, for the trustee :—

As there was no appeal from the refusal of a new trial, the finding of the jury upon the issues cannot be impeached, and the order setting aside the memorandum and the deed is a necessary consequence of that finding: *Ex parte Morgan* (2).

[JAMES, L.J., referred to *Fernie* v. *Young* (3).]

Winslow, Q.C., and *Robson*, for the mortgagee :—

The Court ought to hear the whole case. The notice of motion for a new trial was given before the order was made for cancellation of the deeds, but was not heard till afterwards. It

(1) 11 Ch. D. 525. (2) 2 Ch. D. 72.
(3) Law Rep. 1 H. L. 63.

was sufficient to appeal from the order for cancellation without also appealing from the refusal of a new trial. The Court can disregard the verdict of a jury, just as the Court of Chancery often did: *Ex parte Morgan* (1); *Ex parte Norton* (2).

JAMES, L.J.:—

It appears to me that the Appellant is entitled to the judgment of the Court. We have already decided the question of jurisdiction. And, as to the other point, issues were directed to be tried for the purpose of deciding the question in dispute. The jury have found that the memorandum and the deed were fraudulent. That verdict stands and there is no appeal from it to us. The question is whether upon that finding any other judgment could have been pronounced than that which has been pronounced. I am of opinion that no other could have been pronounced. The appeal must be allowed, with costs in both Courts.

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Solicitors for Appellant: *Llewellyn, Ackrill, & Hammack,* agents for *E. Tennant & Co., Hanley.*

Solicitor for Respondent: *John Burton,* agent for *Thomas Cooper, Congleton.*

(1) 2 Ch. D. 72. (2) Law Rep. 16 Eq. 397.

C. A.
1880
M. R.
Jan. 29.
C. A.
April 10, 17.

In re ARNOLD.
ARNOLD *v.* ARNOLD.

[1877 A. 181.]

Vendor and Purchaser—Misleading Particulars—Specific Performance with Compensation.

A farm was put up for sale under the direction of the Court by particulars accompanied by a plan, and was described as "a compact small farm containing 41A. 3R. 35P., divided as follows." Among the parcels was "490a, *Bottlesey Green*, containing 7A. 1R. 27P," opposite to which, in the column shewing the amounts which made up the 41A. 3R. 35P., was entered 4A. 0. 38P. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such (if any) as the Judge in Chambers should direct. *G.* bought the property in his own name, and was certified as purchaser. He in fact bought as agent for *B.*, who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490a, which was a narrow close containing 7A. 1R. 27P., having a long frontage to a highroad and at one end adjoined *B.'s* property. *B.* alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490a, and *G.*, by his directions, refused to complete. The vendors then entered into an arrangement with the owner of the other three-sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—

Held, by the Master of the Rolls, that, as *B.* had not been substituted as purchaser, *G.* must be treated as the real purchaser, and could not take any objection depending on the circumstances of *B.'s* property, and that, as the arrangement would give the purchaser all he contracted to buy, he must complete without compensation.

Held, on appeal, that *G.*, having only purchased as agent for *B.*, could take any objection which *B.*, had he been the nominal as well as the real purchaser, could have taken; that, for the purpose of resisting completion, the purchaser was entitled to say that he bought the farm as shewn on the plan; that, as the possession of 490a was important to the enjoyment of *B.'s* property, completion could not be compelled unless he could get the whole of it, and that he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property; and that he must therefore be discharged from his purchase.

UNDER an order in this action estates were put up for sale in various lots. Lot 18 was described in the particulars as "a highly productive and compact small farm in *Wingfield* or *Bottlesey*

Green, situate, &c. . . . . containing 41A. 3R. 35P., divided as follows":—

Nos.	Names of Fields.	Cultivations.	Contents.		
			A.	R.	P.
– –	– – – – – – – – –	– – –	–	–	–
– –	– – – – – – – – –	– – –	–	–	–
– –	– – – – – – – – –	– – –	–	–	–
432a	Part of Bottlesey Green	Pasture .	1	0	28
– –	– – – – – – – – –	– – –	–	–	–
– –	– – – – – – – – –	– – –	–	–	–
490a	Bottlesey Green, containing 7A. 1R. 27P. .	. . . .	4	0	38
			41	3	35

The numbers in this description were the numbers marked on the plan annexed to the particulars.

The 14th condition of sale was as follows:—

"Every lot is believed and shall be taken to be correctly described as to quantity, tenure, and otherwise, and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be

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allowed by the vendors or purchaser in respect thereof, except such (if any) as the Judge in Chambers shall be pleased to direct."

Thomas Girling bid for, and on the 29th of August, 1878, was certified to be the purchaser of, Lot 18. He was, in fact, only the agent of Mr. *Borrett*, the owner of the property adjoining the south-east side of this lot.

On investigating the title it was discovered that the testator in the cause was only entitled to four undivided sevenths of the piece of land numbered 490a, and that Lord *Waveney* was in receipt of the rent of the other three-sevenths.

The Plaintiffs' solicitors proposed that a partition of this piece of land should be effected without expense to the purchaser. The purchaser declined this offer, and on the 30th of September, 1878, wrote refusing to complete his purchase. On the 4th of October, 1878, he took out a summons to be discharged from his purchase, as Mr. *Borrett* considered that it was of great importance to him to have the whole of the parcel 490a.

With a view to removing Mr. *Borrett's* objection the trustees of the will of the testator in the action entered into an agreement with Lord *Waveney* that an application should be made to the Inclosure Commissioners for effecting an exchange of Lord *Waveney's* share in 490a for a piece containing four acres, being the northerly part of the parcel numbered 429, the agreement being made conditional on the sale being carried into effect, and on the purchaser being desirous that the agreement should be carried out.

Mr. *Borrett* not being willing to complete on this footing, the summons came on to be heard before the Master of the Rolls on the 29th of January, 1880.

Borrett deposed that before instructing *Girling* to bid on his behalf he had perused and examined the particulars and plan, and fully believed that the whole of 490a was offered for sale, and that it contained 4A. 38P., and that the rest of *Bottlesey Green* lay on the other side of the road. He stated that he did not suppose the whole 7A. 1R. 27P. to be included in 490a, it not having occurred to him to scale the plan. By a further affidavit he went on to say that as he understood the plan and particulars the purchase would give him the whole of the land up to the two roads

except the piece belonging to Miss *Walker;* that the possession of 490a was important to him on account of its frontage to the road, its situation with respect to his other property, and its being the only pasture ground in Lot 18.

Evidence was given on behalf of the Plaintiffs that the auctioneer, in answer to a question put to him in the sale room, explained that the testator was entitled only to four-sevenths of 490a; that this piece of land contained 7A. 1R. 27P.; and that the 4A. 0R. 38P. mentioned in the particulars was equivalent to four-sevenths of it. *Girling* denied having heard any of this conversation. He was orally cross-examined and re-examined, and stated that he was a land agent and not a surveyor; that he had ridden over the land, but was not able to judge by eye as to the acreage of a field; that when he bid he considered that he was buying the whole of 490a; that he had not noticed that 490a, as laid down on the plan, appeared by comparison with the other closes to contain much more than 4 acres; that he supposed it to contain 4A. 0R. 38P., and the rest of *Bottlesey Green* to be on the other side of the road; that when there was a plan before him he took it to be correct, and took the quantities as stated on it, and had done so in this instance, and that until after the sale he had no idea that he was buying only four-sevenths of 490a.

Chitty, Q.C., and *Smart*, for the Plaintiffs.

Ince, Q.C., and *Holland*, for the Defendant.

JESSEL, M.R.:—

I am of opinion that the purchaser has been wrong from beginning to end, but I shall not deal with him, as regards the costs, in the same way as I should do in an ordinary case between a hostile vendor and purchaser, because there no doubt has been a mistake in the particulars, though it was a mistake which, as I think, ought not to have misled a prudent purchaser. But I consider that if there is anything at all done wrong under the sanction of the Court, the Court ought not only not to allow the purchaser to be damnified, but ought to treat him with more liberality than in the case of ordinary sales. I have expressed this same opinion

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in the Court of Appeal, and the reason is obvious. People buying an estate put up for sale under the direction of the Chancery Division believe that everything has been more carefully investigated than it would be by an ordinary vendor; therefore they may be excused if they do not take quite as much care and trouble as they would do if buying from an ordinary landowner.

Now, the case is this: A gentleman happens to possess a farm in *Suffolk* adjoining this little property which was sold. He did not buy in his own name. He employed an agent, who bought in his own name without disclosing his principal, and got confirmation in the regular way as the actual purchaser. In this Court, therefore, he is the actual purchaser, and in strictness I have no right whatever to consider how far the purchase affects the real purchaser, Mr. *Borrett*. There has been no order to substitute the real purchaser, and no attempt to do so. The thing has gone on from beginning to end with the nominal purchaser treated as the real purchaser, and it must be remembered that he is the only person liable to pay the purchase-money, and if he turned out insolvent the vendors could not have recourse to Mr. *Borrett* for it. Therefore the case does not stand on the same footing as if Mr. *Borrett* had been made the purchaser; and in strictness I ought to treat the nominal purchaser as the real purchaser.

Now, if that is so, in my opinion the case is clear against that purchaser. He is not the owner of a neighbouring property, he is simply a man who has bought what is called a highly productive and compact small farm, containing 41A. 3R. 35P. He bought 41A. 3R. 35P., and he is to get 41A. 3R. 35P. The only difference being that through a very odd mistake in the particulars as regards one of the fields (no doubt an important field, as it lies along one side of the road), which is called *Bottlesey Green*, and is stated in the particulars, and truly stated, to contain 7A. 1R. 27P., they profess to sell 4A. 0R. 38P. in it. Anybody reading the particulars with attention would see that he only got part of *Bottlesey Green*. It is called 490a on the map, and is correctly drawn there. But unfortunately the particulars did not state, what the fact is, that the vendors had not four acres out of *Bottlesey Green*, but four undivided sevenths of the seven acres. This would, on a partition, give the owner the four acres, but as the matter stands

he only gets four undivided sevenths, therefore there would be the trouble of the partition which would be necessary to give him four acres. A careful purchaser would have said, "I am getting only four acres out of *Bottlesey Green*, 490a, which contains seven acres, which four acres are you selling me?" Then he would have been told, "We do not sell you any four acres, but four undivided sevenths; you will get four acres on partition." That is the only mistake in the particulars.

The purchaser, however, who is a land agent, actually has the courage to say that although he went and saw the fields, he believed that *Bottlesey Green* which contains 7A. 1R. 27P. contained only 4A. 0R. 38P., and that he was to have the whole of *Bottlesey Green*, although the particulars themselves state that *Bottlesey Green* contains 7A. 1R. 27P. It is surprising that a land agent could think it only contained four acres when it was over seven acres, and that his attention was not called to the fact that the particulars actually stated that 490a contained 7A. 1R. 27P. I do not like to say I disbelieve him, but I do say I do not give credit to his affidavit. He has somehow or other done what so many people do, that is with a view to get his employer off the purchase, he has worked himself up into a belief which I cannot think that he originally entertained.

That is the history of the purchase, and am I to be told that this is a case for letting the purchaser off his contract? The only ground for compensation, as I read the contract, would be the costs of partition, because he will get his four acres on a partition. That may be the subject of some trifling compensation, but he would actually get all that was sold to him, and all that was described as being sold. In my opinion there is not the slightest pretence for letting him off the purchase on the ground suggested.

I will now come to the conditions under which he bought. The 14th condition is: "Every lot is believed and shall be taken to be correctly described as to quantity, tenure, and otherwise, and is sold subject to all chief and other rents," and so forth, "and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors or purchaser in respect thereof, except

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such, if any, as the Judge in Chambers shall be pleased to direct." Under that the purchaser knows that if there is a mistake he will not be entitled to compensation unless the Judge gives it, and he cannot say that an error which makes him liable to pay the expense of a partition is an error which shall annul the sale. If the matter had rested there and an application had been made, not to be discharged from the purchase, but for compensation, I should have given him something in respect of this extra cost, but that is all. He has got what he has agreed to buy, that is, some part of *Bottlesey Green*, in quantity about four acres. As I said before, there is not a pretence for saying that 490a describes anything but *Bottlesey Green*, containing 7A. 1R. 27P., and anybody looking at the plan and seeing the other measurements would have at once seen that the plan represented 7½ acres, because the fields next are also measured; and the quantities are given, and there could not have been, and ought not to have been, and I cannot for myself believe there was, any mistake on the part of the land surveyor or land agent as to the quantity of *Bottlesey Green*.

That would dispose of the whole case, and I should have simply dismissed this summons without saying anything more but for what has occurred since. It appears that the real purchaser was Mr. *Borrett*, and that Mr. *Girling* was only his agent. Mr. *Borrett* states that his object in buying the little farm adjoining was to improve his own property. I have no doubt he states that quite truly. We know that adjoining landowners often give a high price, because they wish to prevent the possibility of a nuisance, and to improve their own property. And he says that it is important for the enjoyment of his property that he should get the whole of 490a. Of course, if he had been the real purchaser, the answer would have been, "It is plain on the particulars that you were not to get the whole; you were only to have four acres, and you did not ask where the four acres were out of the seven." But the matter does not end there. It turns out that by exchange with Lord *Waveney*, who is entitled to the other three-sevenths of 490a, the vendors can give the purchaser the whole of 490a, and they have made a provisional agreement with Lord *Waveney* to that effect. That being so, and Mr. *Borrett* electing, without prejudice to any right of appeal, to adopt the exchange, so as to

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get the whole of 490a, what compensation he can claim I cannot imagine. He has got everything he bought, both as to quantity and position, except that he gets an acre less; but, having regard to the difference in the nature of the land, he gets an equivalent in value.

Then the only remaining question is the question of costs. If this were a case between an ordinary purchaser and vendor, under such conditions of sale as this, and with such information as these particulars give, I have no hesitation whatever in saying that I should have dismissed the summons with costs; but, as I said before, considering that the purchaser bought at a sale under the direction of the Court, and had a right to consider that more than ordinary care was taken in framing the particulars, although I am of opinion that he ought not to have made any mistake, still as there is a slight misdescription, or rather want of description in the particulars, I give him the benefit of that, and dismiss his summons without costs. The agreement with Lord *Waveney* will be confirmed on the purchaser electing to take the piece of land in exchange.

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Girling appealed from this order. The appeal came on to be heard on the 10th of April.

Ince, Q.C., and *Holland*, for the Appellant:—

The 14th condition of sale does not apply where there is a defect of title to a close which is material to the enjoyment of the property, so that the purchaser cannot substantially get what he contracted to buy: *Swaisland* v. *Dearsley* (1); *Dimmock* v. *Hallett* (2). There may have been a certain amount of carelessness on the part of the purchaser, but so there was in *Denny* v. *Hancock* (3), which shews that where the plan and particulars are such as materially to mislead the purchaser he will be discharged. That case is stronger than this, for there the plan and particulars, though misleading, were strictly correct, here they are not. That the part to which there is no title is small makes no difference, as it is essential to the enjoyment: *Knatchbull* v. *Grueber* (4).

(1) 29 Beav. 430.
(2) Law Rep. 2 Ch. 21.
(3) Law Rep. 6 Ch. 1.
(4) 1 Madd. 153, 166, 167.

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Greater accuracy is required in sales by the Court than by individuals: *In re Banister* (1). The proposed exchange with Lord *Waveney* may cause great delay, and it does not compensate us, for it takes away part of the frontage which we reckoned on getting.

Chitty, Q.C., and *Smart*, for the vendors:—

We contend that *Girling* was clearly told by the particulars that he was to have four acres out of 490a, and by the partition we can give him that. The Court will not discharge the purchaser where the defect can be speedily remedied: *Coffin* v. *Cooper* (2). The 14th condition applies to a misdescription which, apart from conditions, would enable the purchaser to rescind, and he cannot be discharged: *Leslie* v. *Tompson* (3). In *Denny* v. *Hancock* (4) the plan was prepared in so misleading a way that Lord Justice *Mellish* considered it to require some charity to believe that it was not framed with the intention of misleading. It is true that the arrangement with Lord *Waveney* will take away part of the frontage, but that is matter of compensation, it not being alleged that the frontage in that part of the property is essential. In *Dimmock* v. *Hallett* (5) there was gross misdescription. As regards *Knatchbull* v. *Grueber* (6), the observations of Sir *T. Plumer* as to compensation are in our favour.

[BAGGALLAY, L.J.:—Lord *Eldon*, in the same case, on appeal, says (7): "This Court does not sit to determine that men shall be willing purchasers whether they will or not, but to judge whether they have got a title; and if they have not got a title to part of the premises there is no principle of equity more artificial than that which goes to determine whether the part to which no title can be made is material, and whether the purchaser, willing or not willing, shall be bound to take the remainder with any and what compensation for the want of title to the defective part." And again (8): "This Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted

(1) 12 Ch. D. 131.
(2) 14 Ves. 205.
(3) 9 Hare, 268.
(4) Law Rep. 6 Ch. 1.
(5) Law Rep. 2 Ch. 21.
(6) 1 Madd. 153, 166, 167.
(7) 3 Mer. 140.
(8) Ibid. 146.

for, or not be compelled to take that which he did not mean to have."]

In *M'Queen* v. *Farquhar* (1) there was a want of title to several acres, but the purchaser was held bound to complete with compensation.

[JAMES, L.J.:—Is there any case where a purchaser has been compelled to take undivided shares with compensation?]

If the case only relates to a small part where the absence of title to the whole of it would only be a subject for compensation, there is no reason why the absence of title to a share of it should be a ground for rescinding.

[BRAMWELL, L.J.:—Is not the case this, that the purchaser had a right to believe himself buying the whole of 490a, subject to a question about acreage which might be settled afterwards?]

We can by the arrangement give him the whole of 490a; and though he was offered an opportunity of adducing evidence that the loss of part of 429 was important to him, he did not avail himself of it.

JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls in this case ought not to be affirmed. It appears to me that the purchaser is well warranted in asking to be relieved from the necessity of performing, not the contract into which he had entered, but another contract which the Court has made for him by giving what is called compensation. Lord *Eldon*, in *Knatchbull* v. *Grueber* (2), expressed his opinion that the Court was becoming more and more in the habit of holding people to the contracts they had made, and not holding them to contracts that they had not made, and I hope that the Court will continue in that course, There is no doubt that if a man purchases a property, and what I may call an infinitesimal portion cannot be given him, then he may be obliged to complete with compensation, and here there is a condition which would oblige him to complete with compensation in such a case. But it has never been held that a man is

(1) 11 Ves. 467. (2) 3 Mer. 146.

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obliged to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he bought.

In my opinion it can make no difference whether you take the purchaser as being Mr. *Borrett* or Mr. *Girling*. Mr. *Girling*, no doubt, was, so to say, the purchaser on the record, he was the person who appeared at the auction-room and bound himself. But, as we know for a fact, Mr. *Girling* was buying for Mr. *Borrett*, and was only an agent for Mr. *Borrett*, and he is entitled to say anything that Mr. *Borrett*, if he had been the purchaser in his own name, could have said, and anything that can be said respecting Mr. *Borrett's* motives or objects which could be considered material to the case if Mr. *Borrett* were the purchaser in his own name must be, to my mind, equally material when said by Mr. *Girling* purchasing as his agent. I, therefore, propose to consider the case exactly as if Mr. *Borrett* had been the nominal as well as the real purchaser.

Now, what Mr. *Borrett* says is that there was a small property, said to contain a little more than forty-one acres, which lay between his property and two roads; and that there was one particular close, marked 490a, which anybody who was acquainted with property would at once see to be very material. There can be no doubt that the loss of 490a would be very inconvenient to Mr. *Borrett*, for he would have interposed between his estate and the road a long strip belonging to somebody else, with a possibility of a nuisance being erected on it by the owner; or, if Mr. *Borrett* were minded to be a game preserver, the absence of that strip would materially diminish the value of the estate, for the owner might grow upon it buckwheat, or anything of that kind, which would induce the pheasants to come to it for the purpose of being poached. Indeed, one does not know to what extent a strip of that kind might be an inconvenience. There is then, to my mind, a very substantial difference between the property with 490a and the property without 490a, and the purchaser, if he cannot get that strip, has a right to say, "What you offer me is substantially a different thing from that which I was minded and intended to buy;" and Mr. *Borrett* and Mr. *Girling* both depose to

the importance of this parcel. That being so, it seems to me that the purchaser is entitled to be relieved, on the ground that he does not get substantially the thing for which he contracted.

Then it is said, "If you had looked at the plan and looked at the property itself, and then read the particulars, you must have seen that there was some mistake, and you ought to have inquired and ascertained what that mistake was, and you would have found at once that you were not getting the whole of 490a, but only a share of it." That is not, to my mind, a very acceptable suggestion on the part of a vendor. If a man makes a description calculated to mislead, I do not think it is well for him to say, "If you had been very careful, you would have found out the blunder." How was it that he did not himself find it out? How can the vendors be heard to say that the purchaser ought to have found out for them that very blunder which they never found out for themselves? Mr. *Girling* says he rode round the property and looked at it, and looked at 490a, but never thought whether it was four acres or seven acres. It would not be according to the ordinary course of business to go and inquire into the details of the acreage, and see whether they exactly fitted into the particulars referred to, and I have no doubt that he took it for granted, and reasonably and properly took it for granted, that the farm contained 41A. 3R. 31P., and consisted of the closes shewn on the plan. It appears to me there was nothing in the particulars or the representations made on the particulars, which bound Mr. *Girling* or Mr. *Borrett* to take something other than the 490a which he considered himself to be buying. In my opinion he certainly was not obliged to take four undivided sevenths of it, nor to take what was offered him by way of compensation. It is, to my mind, new to insist on a man taking an undivided portion of a close or a farm instead of the close or farm itself; and we cannot look at what is a reasonable compromise, or compel a man to accept a reasonable compromise or deprive him of his rights because he does not accept what the vendors call a reasonable compromise. The case must stand exactly as if no attempt had been made to settle with Lord *Waveney*.

If that is so, how does the matter stand? The purchaser says, "I wanted to buy Lot 18, and you cannot give me what is shewn

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to be a very important part of Lot 18." In my opinion the purchaser is entitled to be relieved from the contract.

BAGGALLAY, L.J.:—

I also think that the appeal should be allowed. Whether we regard Mr. *Borrett* or Mr. *Girling* as the purchaser, the purchaser was induced to bid for Lot 18 by the mistake which had been made by the vendors in the particulars of sale; and in considering what the particulars of sale are, it is, in my opinion, impossible to exclude the plan which is attached to them, and by which, as everybody knows, purchasers are often as much guided as by the printed portion of the particulars.

The mistake in the particulars appears to me to be a mistake of a serious character, and the judgment of the Master of the Rolls seems to be founded on his not giving credit to the statements made by Mr. *Girling* in his affidavit. It appears to me that an impression which has been stated to have been entertained by the vendors, that Mr. *Girling* was aware of the state of the title to 490a, was conveyed somehow or other to the Master of the Rolls' mind; for unless this was the case, I cannot understand several of his observations upon Mr. *Girling's* conduct. Mr. *Girling* had in his affidavit as clearly as possible stated that he was not aware of the mistake, but believed that he was purchasing the whole of 490a, but the Master of the Rolls, after commenting on his evidence, winds up by saying, "I do not like to say I disbelieve him, but I do say I do not give credit to his affidavit. He has, somehow or other, done what so many people do, that is, with a view to get his employer off the purchase, he has worked himself up into a belief which I cannot think that he originally entertained." I am bound to say that I cannot take that view of Mr. *Girling's* conduct or of the statements made by him. I give the fullest credit to the statements and the representations he has made.

Then, is this a case in which specific performance with compensation ought to be ordered? It has been suggested that compensation may be given in one of three several ways, and first by a partition by the Court. I am by no means satisfied that if a partition had been effected before the time for completion, and four acres out of the estate had been allotted to the vendors, that

the purchaser would have been bound to complete; for in any proceeding to enforce the contract against him, I am disposed to think that he would have been entitled to say that it was a contract to sell the whole of the piece of land surrounded by the mauve colour on the plan. But, be that as it may, no such partition has been obtained, and it might take weeks or months to obtain it. It is then said that it may be attained by a partition or exchange through the Inclosure Commissioners. Both those proceedings may, and probably would, take a long time, and is the purchaser to complete and take the chance of his being able to obtain such partition or exchange after he has completed his purchase, or is he to postpone the completion of his purchase till it is done? As far as regards exchange, it appears to me monstrous to say, "We will let you have the seven acres at the bottom of your property, but you shall give up the four acres in another material part of your property comprising a frontage on the road." As regards the only remaining mode in which compensation could be given, viz., pecuniary compensation, that is only adopted in a case where there is a trifling difference between the actual state of the property and the state in which it was represented to be by the vendors. When the property conveyed falls short of the right number of acres to a small extent, or comprises a larger number of acres, pecuniary compensation may be given or taken by the one side or the other, but no case is present to my mind in which pecuniary compensation has been given when the property to which a title cannot be made is a material part of the property bought. If there had only been a want of title to a little bit of land in a remote part of the property, the purchaser might be ordered to complete with compensation; but this piece with a long frontage to a high road is so material to the enjoyment of the rest, that I am satisfied it is not, according to the authorities, a proper case for compensation. I agree that he appeal must be allowed.

BRAMWELL, L.J.:—

I am of the same opinion. I should like to deal with the case as though the question were whether any action would have been

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maintainable at common law to recover damages against Mr. *Girling* for refusing to complete. I am clearly of opinion that no such action could have been maintained.

The contract into which the purchaser entered is contained in the conditions and particulars of sale. It struck me at one time that if he had seen the discrepancy between the plan and the contents, and had said to himself, "I see there is some mistake, but I will buy taking my chance as to the contents," he might have been held to be bound to complete. When a man signs a contract he is bound to see the whole terms of it and find out its meaning, and I do not think that it would be of any use for him to say that he understood it in a particular sense if its proper construction were otherwise. But it seems to me that, looking at the plan and particulars, the true construction of the contract is that the purchaser has bought the estate shewn on the plan, subject to a question whether 490a contained four acres or seven acres. Neither can be conveyed to him its entire, but only an undivided four-seventh of the whole piece. The purchaser's objection then is, that you cannot give me the thing I bought, and it is admitted that they cannot, and in my opinion there ought to be an end of the matter.

But it seems that a practice sprang up in the Courts of Equity of disregarding the old sensible rule that a bargain is a bargain, and that people should be held to it, and of making bargains for the contracting parties which they never would have made for themselves. Lord *Eldon* said that in his time the Court was becoming more and more in the habit of holding people to the contracts they had made. That is what I humbly venture to think should be the rule, and I trust that this case will be a step further in that direction. I desire to say on my own part that, looking at the reasonableness of the thing, it would be monstrous to make Mr. *Borrett* take this estate without giving him the whole of 490a. I think it would be wrong to make Mr. *Girling* take it, even if he purchased on his own account.

The only other observation I wish to make is, that I entirely concur in what Lord Justice *Baggallay* has said with regard to the evidence of Mr. *Girling*. I do not see the least ground for distrusting his *bona fides*.

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JAMES, L.J.:—

As regards Mr. *Girling's* evidence, I wish to state that I most implicitly believe all he has said.

An order was accordingly made discharging the applicant from his purchase, with costs both at the Rolls and in the Court of Appeal, and ordering a return of the deposit with interest. The Appellant asked for interest at £5 per cent., as that was the rate at which under the conditions interest was to run in case of delay in completion, but the Court held that only £4 per cent. should be given.

Solicitors: *White, Borrett, & Co.; E. Bromley.*

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1880
April 22.

Ex parte FARDON'S VINEGAR COMPANY.
In re JONES.

Appeal—Objection as to Time—Costs—Affidavit filed by Respondent after Appeal set down.

If a respondent to an appeal takes the objection that the notice of appeal was given too late, and the appeal is dismissed on that ground, the appellant will not be ordered to pay the costs of affidavits filed by the respondent after the appeal was set down.

AFTER this appeal had been set down, the Respondent filed affidavits in reply to some new affidavits which the Appellants had filed in support of their appeal.

On the appeal being opened,

Underhill, Q.C., and *R. Vaughan Williams*, for the Respondent, objected that the notice of appeal had been given too late.

E. Cooper Willis, for the Appellants:—

I cannot deny that the notice was given too late. But if the Respondent intended to rely on this objection, he ought not to have filed affidavits in reply to our new affidavits. We ought not to pay the costs of the Respondent's new affidavits.

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THE COURT (*James*, *Baggallay*, and *Bramwell*, L.JJ.) dismissed the appeal with costs, except the costs of the new affidavits in reply.

Solicitors for Appellants: *Tippetts, Son, & Tickle*, agents for *E. Eaden, Birmingham.*

Solicitors for Respondent: *Llewellyn, Ackrill, & Hammack*, agents for *E. Tennant & Co., Hanley.*

In re MERCER AND MOORE.

M. R.
1880
Feb. 14.

[1879 M. 407.]

Vendor and Purchaser—Bankruptcy—Freehold Estate of Bankrupt—Onerous Covenants—Disclaimer by Trustee in Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23.

An owner of freehold property, "burdened with onerous covenants" within the meaning of sect. 23 of the *Bankruptcy Act*, 1869, the title deeds of which he had deposited with an equitable mortgagee, became bankrupt. The trustee in bankruptcy executed a disclaimer of the property under the said section. Subsequently he and the bankrupt purported to convey the property to the equitable mortgagee, whose assigns contracted to sell the same to a purchaser. On a summons taken out by the purchaser under the *Vendor and Purchaser Act*, 1874:—

Held, that there had been a complete disclaimer by the trustee of the bankrupt's estate; that the subsequent conveyance was inoperative; and that the legal estate was outstanding and could not be got in under the *Trustee Act*, 1850.

Semble, where the freehold property of a bankrupt is disclaimed by the trustee under sect. 23 of the *Bankruptcy Act*, 1869, it reverts to the Crown.

THIS was a summons taken out by a purchaser under the *Vendor and Purchaser Act*, 1874.

By an indenture dated the 8th of May, 1866, and made between *J. A. P. Macgregor* and *G. H. Macgregor* of the first part, *C. Whitehead* of the second part, and *James Anderton Dewhurst* of the third part, in consideration of the yearly rents reserved and the covenants and agreements thereinafter contained on the part of the said *J. A. Dewhurst*, his heirs and assigns, to be paid, observed, and performed, they the said *J. A. P. Macgregor* and *G. H. Macgregor* and the said *C. Whitehead* did grant and assure unto the said *J. A. Dewhurst* and his heirs all those three plots of land in *Blackburn* therein described (including the land which was the subject of the purchase), to the use and intent that they the said *J. A. P. Macgregor* and *G. H. Macgregor*, their heirs and assigns, should out of the said plots of land receive and take the perpetual yearly rent-charges therein mentioned; and to the further use and intent that, if all or any part of the said rent-charges should remain unpaid as therein mentioned, then the said *J. A. P. Macgregor* and *G. H. Macgregor*, their heirs and assigns, should

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have the powers of distress and entry in the said indenture contained, and, subject to the said rent-charges, and to the means and remedies thereby provided for securing payment thereof, to the only use and behoof of the said *J. A. Dewhurst*, his heirs and assigns.

By the same indenture the said *J. A. Dewhurst*, for himself, his heirs, and assigns, covenanted with the said *J. A. P. Macgregor* and *G. H. Macgregor*, their heirs and assigns, for payment of the said yearly rent-charges, and within one year of the date thereof to erect upon each of the said plots of land houses of the value therein mentioned, and keep the same in good repair; also, not to erect more than a certain number of dwelling-houses fronting the turnpike road or fronting the intended new street therein mentioned, and not to erect any buildings except dwelling-houses of the description therein mentioned; also at his and their own expense, on being thereunto required by the said *J. A. P. Macgregor* and *G. H. Macgregor* or their surveyor, and to their or his satisfaction, to make and pave with good materials a new street as therein mentioned, and to fence off the said plots of land from the street by a stone wall, and keep the new street and wall in good repair; also to leave open and unbuilt a portion of the land, and to use and occupy the same as gardens; also not to erect on the said plots of land any factory, power-loom, or steam-engine, and not to exercise or permit to be carried on upon the land or any buildings to be erected thereon any offensive trade, and that none of the buildings to be erected should be occupied as an inn or public-house.

By an indenture dated the 1st of July, 1870, the said several plots of land mentioned and comprised in the said indenture of the 8th of May, 1866, and the buildings erected thereon, were, for the considerations therein mentioned, conveyed to *John Smith* in fee, subject to the yearly rents and the powers and remedies for securing the same in the said indenture of the 8th of May, 1866, contained, and to the covenants and conditions in such indenture also contained.

The said *John Smith* subsequently deposited the title deeds of the property with *William Jardine* as a security for the repayment of the sum of £603 and interest.

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On the 5th of September, 1870, after the title deeds had been so deposited, *John Smith* was adjudicated a bankrupt, and, on the 26th of September, 1870, *John Wilding* was appointed trustee in bankruptcy of his estate.

On the 2nd of June, 1871, *John Wilding* executed a deed of disclaimer in these terms: "I, the undersigned, the trustee of the estate of *John Smith*, bankrupt, do hereby disclaim all those three plots of land situate in *Blackburn* and conveyed to the said *John Smith* by indenture dated the 1st day of July, 1870."

By an indenture of the 27th of March, 1872, and made between *John Wilding* of the first part, *John Smith* of the second part, and *William Jardine* of the third part, after reciting that *William Jardine* had elected to take the property intended to be thereby assured in satisfaction of his principal money and interest, and in order to perfect his title he had requested *John Wilding* and *John Smith* to execute these presents, it was witnessed that he the said *John Wilding* (according to his estate and interest in the premises, if any), and at the request of the said *William Jardine* and *John Smith*, did thereby grant, and he the said *John Smith* (according to his estate and interest in the premises, if any, and at the request of the said *William Jardine*) did thereby grant and confirm unto the said *William Jardine*, his heirs and assigns, that portion of the said plots of land which was in the said indenture described, subject to the covenants contained in the indenture of the 8th of May, 1866.

By a subsequent indenture *William Jardine* purported to convey the plot of land comprised in the last mentioned indenture to *Margaret Hartley*, who purported to convey a portion thereof to *John Chew*, who purported to convey the same to *James Beardsworth*, who by an indenture dated the 24th of January, 1879, purported to convey a portion of the premises so conveyed to him to *W. E. Beardsworth*, who, by his will, dated the 14th of June, 1879, devised all his real estate unto and to the use of *Daniel Mercer* and *James Beardsworth*, the present vendors.

By a contract dated the 17th of September, 1879, the vendors agreed to sell, and the purchasers agreed to purchase, the premises comprised in the last-mentioned indenture of the 24th of January, 1879, for £521.

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An objection to the title having been taken by the purchaser, he took out a summons, under the *Vendor and Purchaser Act*, 1874, that it might be declared that the legal estate in the property contracted to be sold by the vendors was then outstanding, and that the vendors might be directed to obtain the joinder of the person or persons in whom the legal estate might be vested.

The main question was as to the effect of the disclaimer of the 2nd of June, 1871, by *Wilding*, the trustee in bankruptcy of *John Smith*, having regard to the provisions of sect. 23 of the *Bankruptcy Act*, 1869 (1).

W. W. Karslake, for the purchaser:—

The property in question was duly disclaimed by the trustee in bankruptcy under sect. 23 of the *Bankruptcy Act*, 1869. It was freehold, and therefore within the words "land of any tenure." It was also "burdened with onerous covenants," for, under the indenture of the 8th of May, 1866, there were covenants binding on the owner of the land to erect dwelling houses, and to make a road, and there were also various negative covenants for the breach of which on his part or on that of those holding under him, liabilities would be incurred. If, then, the trustee has duly disclaimed, what has become of the legal estate? It cannot be in the

(1) Sect. 23: "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just."

trustee, for he has disclaimed, and the section provides that it shall "revert to the person entitled on the determination of the estate or interest of the bankrupt." It cannot have become in *William Jardine*, the equitable mortgagee, for his interest was paramount to the estate of the bankrupt, and he was entitled to no other rights on the determination of the bankrupt's estate. It cannot be in the bankrupt, for the section provides that if there shall be no person in existence entitled on the determination of the estate of the bankrupt, "then in no case shall any estate or interest remain in the bankrupt." It is not for me to say where the legal estate is: it may be *in gremio legis*, or it may be in the Crown; at any rate it is outstanding.

This defect is not remedied by the indenture of the 27th of March, 1872, whereby the trustee in bankruptcy, and the bankrupt, and the equitable mortgagee, purported to convey the estate, which could not be effectually done after the disclaimer.

Davey, Q.C., and *Renshaw*, for the vendors:—

The 23rd section of the *Bankruptcy Act*, 1869, does not apply to freehold estates: it is true that in terms it applies to land of any tenure, but that must be qualified by the rest of the section, which is inapplicable to freeholds. There is nothing to shew what is to become of freehold property belonging to the bankrupt after the trustee has disclaimed.

Even if the section does apply to freeholds, it does not apply to the property in question, because it was not "burdened with onerous covenants." There were restrictive covenants and negative covenants, but none that could fairly be called onerous.

Further, the disclaimer, if it took effect at all, related back to the time of the adjudication in bankruptcy. It was only a disclaimer of the equitable interest of the bankrupt, who still remained trustee of the legal estate for the equitable mortgagee: *Beale* v. *Symonds* (1). By the indenture of the 27th of March, 1872, the legal estate was conveyed to the mortgagee, who elected to take the land and to give up his right of proof against the estate of the bankrupt. There has been no escheat to the Crown,

(1) 16 Beav. 406.

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and the legal estate is not outstanding. Therefore, we contend that the vendors can make a good title to the property.

JESSEL, M.R. :—

Mr. *Karslake*, I am very reluctantly compelled to come to the conclusion that this title cannot be forced upon you. What the section precisely means I, for one, do not pretend to say, and whether it is possible to construe it in some shape or other so as to prevent its doing the mischief which it seems to produce in the present case, I am unable to state. It is quite possible that a Court of higher jurisdiction may be enabled to put some construction on the Act of Parliament not exactly in accordance with the wording of it, but substantially in accordance with either what was intended or ought to have been intended by the framers of it, but I am unable to do anything of the sort.

I must first consider what the section was intended to provide against. It is manifestly intended to provide against this, that neither trustee nor bankrupt should take against their wills property burdened with obligations of an onerous character. That is the main object of the section. If the property was not worth taking the trustee was entitled to get rid of it, and the bankrupt was not to have it. Of course the bankrupt would have no money, and the trustee was not to spend the money of the creditors for this purpose. That is the view of the section which presents itself to my mind on first reading it.

Now let us consider for a moment what this property was. It was not technically a leasehold, but it was very much like it. It was an ordinary grant in fee farm, that is to say, ordinary in the part of the country where this property is situated, and at a fee farm rent with onerous covenants. It is not necessary to consider that point here, but I may assume for this purpose that the covenants do run with the land at law, so as to put a personal liability on the assigns. I assume it for the purpose to be clear, but it was a grant of pieces of land, of buildings partly built and partly unbuilt, with the usual covenant to erect buildings within a year, and to maintain the buildings in good repair. Then the covenantor was not to allow trades to be carried on, and was not

to permit to be built more than a certain number of dwelling-houses, and not to allow any cellars or apertures, but to leave open and unbuilt upon certain spots; in fact there were all sorts of provisions, the neglect of which would certainly subject the legal owner of the land to an injunction, whether it would subject him to an action for a breach of covenant or not. Therefore, it is plainly onerous, because if the owner left the land to take care of itself, the tenants might break all those covenants, and he could be sued for allowing them to be broken, he being the legal owner of the land. That being so, it is clearly a property burdened with onerous covenants.

Now, supposing there had been no mortgage interest, the trustee might say: "Very well, it is not worth the rent, and there are all sorts of covenants attached to it, so that if I take it I shall be liable to all sorts of actions for allowing these things to be done; I will have nothing to do with it; it is of no value, and I want to get rid of it." Surely that is a case to which the section ought to apply, and not the less because it is freehold estate. For the Legislature must be taken to have known, as we all know, that in a very large portion of this country—and I wish it were a larger portion—people will not take houses upon any other terms, they will not take leases with provisions for forfeiture or re-entry. Therefore it cannot be supposed that the trustee in bankruptcy was not to be capable of disclaiming this kind of freehold. I should have said *à priori* that it was the very thing of all others which he should be entitled to get rid of.

That being so, is there any reason, from the nature of the thing, for cutting down the meaning of the plain words in the first part of the section? The words are: "Where any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants." It appears to me that the words "land of any tenure" must be read as "land of any tenure"; and how it can be argued within these words lands of freehold tenure are not included, it is difficult to say. Then it comes to this, that it is exactly described by the words, and is, within what one must consider to be the purview and intendment of the Act, a sort of thing which the trustee may get rid of.

The next point I have to consider is, whether in the present

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case the trustee in bankruptcy did get rid of it? I cannot imagine that he did not. He disclaimed it in the terms of the Act of 1869. What did he disclaim it for? Not to get rid merely of the equity of redemption, but to get rid of the thing altogether. The object of his disclaimer was to have done with it. That was the very object of the Act. This particular property would be in the same position as if he never had it; and I am satisfied he meant by his disclaimer to disclaim it altogether, and that I must give the literal meaning to the disclaimer, not merely because it is the literal meaning, but because it is the true meaning, and the trustee did intend to get rid of it.

In March, 1872, this happened: the mortgagee, finding out the disclaimer, but still wishing to get the legal estate, asked the trustee to convey, and the bankrupt also. Did they convey? Not at all. What they did was this: there had been an application to perfect this title. They agreed to convey anything they had, and we shall find when we come to the conveyance, although I do not think the conveyance of 1872 could alter the meaning of the disclaimer of 1871, that they do not profess to do more than this: the said *John Wilding*, that is, the trustee, "according to his estate and interest in the premises, if any," purported to grant, and the bankrupt, "according to his estate and interest in the premises, if any," purported to grant. Those very words shew they doubted whether they had got anything, and even if it had been contemporaneous, I do not see how the conveyance in that form could have controlled the disclaimer. Therefore, it appears to me that, whatever effect might be attributable in law to the disclaimer, it could not in the slightest degree be affected by the terms of the conveyance. Then I am brought back to this—what is to happen if the trustee disclaims? I must confess I am puzzled. I do not exactly know what is to happen. The section provides that after the execution of the disclaimer "the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date, and if the same be shares in any company, be deemed to be forfeited from that date." Now all that is clear. Then we come to these words: "and if any other species of property, it shall

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revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt." The word "then" is probably not the best word to use; it should have been "but," but that is what it means. Therefore, whatever happens, the bankrupt is to have no estate, and that is the enactment.

It must be remembered there was an equity of redemption coupled with the legal estate, the mortgage being an equitable charge by deposit, and therefore, according to the ordinary rules in bankruptcy, it did pass to the trustee, and could be disclaimed by him. But it was argued that the effect of the disclaimer was first of all to relate back to the adjudication. I do not see that it is so. It is so enacted as regards a certain species of property, and as regards all the rest it is left to take effect as from the date of the disclaimer. I cannot see any back date. It is then said that that will make it a pure trust estate, and will vest it in the bankrupt. I cannot allow that argument to prevail. It will be for a stronger Court than mine, being a Court of first instance, to allow that, because, as it appears to me, the Act provides "that it shall not vest in the bankrupt;" and therefore it appears to me if you go under that section, whoever has it the bankrupt has not.

Then where has it gone to? This is a question which is easier asked than answered. First, it may be said that it goes to the Crown. No doubt the Queen is a "person" in one sense. It is to revert "to the person entitled to the estate or interest of the bankrupt." There is no person literally entitled upon the determination of the freehold to take except the Crown. If a freehold estate comes to an end by death without an heir, or by attainder, it goes back to the Crown on the principle that all freehold estate originally came from the Crown, and that where there is no one entitled to the freehold estate by law it reverts to the Crown. If this means literally the determination of the estate anyhow, it may determine by bankruptcy as well as by attainder, and then literally this section would seem to give it to the Crown. I am not prepared to say it does not. This, however, is no way of getting out of the difficulty—indeed you get into a worse difficulty here,

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for how are you to get the estate out of the Crown again? There are no means that I know of except by actual grant or by the will of the Crown to get back a legal estate, which would be a very awkward result and very prejudicial to many titles in this part of the country, especially where these titles are very common. If that is not so, I do not know where the estate is.

As regards the words, if they are applicable to the Crown, I agree there must always be a person in existence as to the freehold estate as there is with a copyhold estate, because if there were no lords of the manor it would at once go back to the Crown. But there is a case in which there is no person in existence, and that is the estate in the leasehold. If a man died intestate, and if there were no legal personal representative, there would not (that is to say, if there were no legal personal representative appointed) be a person so entitled, so that you may have a possible case there in which the words would fit. As I have said before, I am not sure here that the estate is in the Crown, but if it is not in the Crown I do not know where it is. At all events it is not in the trustee in bankruptcy, and has not been conveyed, therefore, to the present vendors. Therefore they cannot convey to the present purchasers. I have looked into the *Trustee Act*, and I do not see any mode of getting in the legal estate. The *Trustee Act* does not provide for want of an heir.

I must, therefore, though with great regret, allow the objection, and as it is no fault of the purchaser that the *Bankruptcy Act* is so worded, the vendors must pay the costs of the summons.

Solicitors for Purchaser: *Bridges, Sawtell, Heywood, Ram, & Dibdin*, agents for *Robinson, Sons, & Gill, Blackburn.*

Solicitors for Vendors: *Shaw & Tremellen*, agents for *H. S. Whalley, Blackburn.*

RAYNER *v.* PRESTON.

M. R.
1880
April 19.

[1879 R. 136.]

Vendor and Purchaser—Fire Insurance—Insurance by Vendor—Fire after Contract, but before Completion—Right to Insurance Moneys.

A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. After the date of the contract, but before the date fixed for completion, the house was burnt, and the vendor received the insurance money from the office. The contract contained no reference to the insurance:—

Held, that the purchaser was not entitled as against the vendor to the benefit of the insurance, either by way of abatement of the purchase-money or reinstatement of the premises.

Quære, whether in such a case, a contract of fire insurance being merely a contract of indemnity, the insurance company cannot compel the vendor to refund the money they have paid, if he gets his full purchase-money from the purchaser.

BY a contract dated the 31st of July, 1878, the Defendants agreed to sell to the Plaintiffs a house in *Suffolk Street, Liverpool*, for £3100.

Prior to and at the date of the contract the house stood insured by the vendors against fire with the *Liverpool and London and Globe Insurance Company*, but the contract contained no reference to this insurance.

Shortly after the date of the contract, and before the date fixed for completion, the house sustained damage by fire to the amount of £330, which sum was eventually paid to the vendors by the insurance company, who were not then aware of the contract.

In consequence of the vendors (who were trustees under a will) refusing either to hand over the money to the purchasers or to expend it in reinstating the premises, the purchasers brought this action against the vendors, claiming a declaration that they, the Plaintiffs, were entitled to the benefit of the moneys received by the Defendants from the insurance company, and to have such moneys paid or allowed to the Plaintiffs accordingly: or otherwise to have them laid out towards reinstating the premises.

The Plaintiffs alleged that from some communications which

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had passed between themselves and the Defendants, they, the Plaintiffs, had been led to believe that they, and not the Defendants, were to be entitled to the benefit of the insurance.

The action now came on for trial.

Roxburgh, Q.C., and *Ingle Joyce*, for the Plaintiffs:—

First, we say upon the facts that we were led by the Defendants to believe that we were to have the benefit of the insurance. Secondly, as to the law, we submit that we are entitled to have the amount of the insurance money received by the Defendants either allowed in reduction of our purchase-money or expended in reinstating the premises.

[*Chitty*, Q.C.:—In *Poole* v. *Adams* (1) it was held, that, in the absence of express provision in the contract, a purchaser is not entitled to the benefit of an existing fire insurance.]

But there the previous case of *Garden* v. *Ingram* (2) was not cited, where Lord *St. Leonards* held that a mortgagee was entitled to the benefit of a fire policy effected by the mortgagor, although it was not noticed in the mortgage. Upon that case Mr. *Dart* says (3), "Much of the reasoning in the judgment seems to apply equally to a purchase out and out." And then, after stating the decision in *Poole* v. *Adams*, he proceeds, "That is to say, that the vendor may, if he can get it, take his purchase-money twice over: once from the insurance office, and again from the purchaser; and Equity, although it will not enforce payment by the purchaser, who gets nothing, will not relieve him from the legal consequences of the contract, and of subsequent events. Had the former case (*Garden* v. *Ingram*) been cited, it may be supposed that the Court would have seen its way to the adoption of the reasonable doctrine; viz., that although, in the absence of stipulation, a vendor is not bound to keep up, or perhaps even to assign, a fire policy, yet that, as regards any money which he may actually receive under it, for damage done to the inheritance subsequently to the date of the contract, he holds such money upon an implied trust to make good the damage. It is obvious that no

(1) 12 W. R. 683. (2) 23 L. J. (Ch.) 473.
(3) Dart's V. & P. 5th Ed. p. 812.

honest man could, for his own benefit, act in accordance with the decision in *Poole* v. *Adams*" (1).

In *Lees* v. *Whiteley* (2) Vice-Chancellor *Kindersley* accepted the authority of *Garden* v. *Ingram* (3).

[JESSEL, M.R.:—It does not follow that the insurance company cannot get back the money they have paid, if the vendor is paid for his loss otherwise: a contract for fire insurance is only a contract of indemnity.]

But if the vendor does recover the money from the insurance company he holds it as a trustee for the purchaser pending the completion of the contract; and so Mr. Justice *Mellor* seems to have thought in *Collingridge* v. *Royal Exchange Assurance Corporation* (4).

In *Reynard* v. *Arnold* (5), a case of landlord and tenant, it was held that the lessee, in exercising his option of purchase under the lease, had a right to say that the landlord must take any fire insurance moneys received by him on account of the purchase-money.

In *Edwards* v. *West* (6), which may be cited against us, a lessee with option of purchase was held not to be entitled, upon the exercise of his option, to insurance money received by the landlord: but there the actual contract to purchase was not entered into until after the fire; so that at the date of the fire the lessee had done nothing to make the property his own in equity. But in the present case the property was, at the date of the fire, ours in equity, the vendor being a trustee of the legal estate for us. If an unpaid vendor is a trustee of the property for the purchaser, surely he should be treated as a trustee, or quasi-trustee, of all accretions to the property, such as moneys received by him under a fire insurance. We submit that, upon every principle of honesty and equity, when a man, having parted with his house and being no longer entitled to it, receives the money for which the house was insured, he should hold it as trustee for the man to whom the house belongs.

The effect of sect. 83 of 14 Geo. 3, c. 78, which provides for

(1) 12 W. R. 683.
(2) Law Rep. 2 Eq. 143, 148.
(3) 23 L. J. (Ch.) 478.
(4) 3 Q. B. D. 173, 177.
(5) Law Rep. 10 Ch. 386.
(6) 7 Ch. D. 858.

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insurance money being expended in rebuilding, is, we submit, to place us in the same position as if the Defendants had covenanted so to apply the money they received; the section being of universal and not merely local application: *Ex parte Gorely* (1).

Chitty, Q.C., and *Bardswell*, for the Defendants, were not called upon.

JESSEL, M.R.:—

If this case were *res integra*, and I had to decide it on my view of what was reasonable, I might have found some way of assisting the Plaintiff; but it appears to me that the case is really concluded by authority.

The first point I have to decide is whether—assuming that Lord *Westbury's* decision in *Ex parte Gorely*, as to the generality of the statute 14 Geo. 3, c. 78, that is to say, as to its application to districts other than those within the bills of mortality, applies to every case of an unpaid vendor—the vendors, having entered into this contract, are, upon the facts alleged in the statement of claim, trustees for the purchasers of the insurance money received by them.

[His Lordship then read the allegations in the statement of claim as to the Plaintiffs having been led to believe that they were to have the benefit of the insurance money, and held that no case of representation had been made out against the Defendants. His Lordship then continued:—]

The only point that remains to be considered is as to the general law. The general law is asserted to be this, that when a man contracts to buy a house without immediately paying his purchase-money, and the vendor has insured the house against fire, and a fire happens before the completion of the contract by payment of the purchase-money, and then the insurance company pays the insurance money to the vendor instead of laying it out in reinstating the house, there is an equity on the part of the purchaser to make the vendor apply the insurance money in part payment of the purchase-money; in other words, that the insurance money results to the purchaser without any special contract.

(1) 4 D. J. & S. 477.

Having regard to Lord *Westbury's* decision in the case I have mentioned, it is possible that, were I making the law for the first time, I might in this case devise some arrangement which would be fair to the purchaser, but I find that the law on this subject has already been laid down long ago.

Now let us see how Lord *Eldon* laid down the law seventy-nine years ago in *Paine* v. *Meller* (1). That was a peculiar case: the insurance policy was allowed to expire on the day on which the contract was to have been completed, and it was said that the vendor should have communicated to the purchaser the circumstance of the insurance expiring. Upon that Lord *Eldon* says (2), "Then as to the non-communication, I cannot say that in my judgment forms an objection, for I do not see, how I can allow it, unless I say, this Court warrants to every buyer of a house, that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy." So there he puts it in plain terms, that in buying a house you do not buy the existing policy. Then he goes on, "However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value, or near it. The question, whether insured or not, is with the vendor solely, not with the vendee; unless he proposes something upon that; and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured."

Then the point came before Vice-Chancellor *Kindersley* in 1864 in *Poole* v. *Adams* (3), where the Vice-Chancellor held that, in the absence of any provision in his contract, a purchaser of a house is not entitled to the benefit of an existing insurance against fire. There the very point we have here occurred: before the completion of the contract the house was burnt down. At the date of the contract and the fire the house was insured in the name of the vendor for £100, and he received the insurance money from the office without the privity of the purchaser, and without communicating to the office the fact that a sale had taken place. The Vice-Chancellor held that, there being no provision in the

(1) 6 Ves. 349. (2) 6 Ves. 352.
(3) 12 W. R. 683.

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contract that the purchaser should have the benefit of the insurance, the vendor was entitled to retain the insurance money, and that the purchaser must pay the whole of his purchase-money.

That decision was in 1864, and I am not aware that it has since been doubted.

The case of *Collingridge* v. *Royal Exchange Assurance Corporation* (1) has no direct bearing upon this case. All that the Judges there decided was that an unpaid vendor who had insured was entitled to recover from the insurance company the ground of the decision being that an unpaid vendor could not know whether he would ultimately get his purchase-money or not. Mr. Justice *Mellor* says (2): "Whether, when he (the vendor) receives this money, supposing that the defendants do not choose to reinstate the premises, he will become trustee of it for the Board of Works (the purchasers), is another question, but I do not see why the unexecuted bargain between him and the board can affect his right to recover." There was another question, namely, whether a contract for fire insurance being merely a contract of indemnity the insurance company were not entitled to recover from the vendor on his being paid his full purchase-money by the purchaser. That question was not considered at all. Then Mr. Justice *Mellor* proceeds, "If it were otherwise he would suffer great inconvenience, and would have to rely on the solvency of this purchaser of his property, and though in the present case the purchaser is a powerful corporation, and there is no reason to doubt that the purchase-money will be paid, this is a mere accident, which ought not to interfere with his right to take measures for the protection of his security. The defendants are quite mistaken in supposing that they have only to pay the plaintiff the amount of the loss which, as between him and third persons, he may ultimately sustain."

Then Mr. Justice *Lush* says, "If the plaintiff had actually conveyed them (the premises) away before the fire, that would have been a defence to the action, for then he would have had no interest at the time of the loss." That is, if the vendor had been paid his purchase-money in full, he would have had no interest in the property, and could have maintained no action.

(1) 3 Q. B. D. 173. (2) 3 Q. B. D. 177.

We will now turn to a text-book on the subject. On looking at *Bunyon* on Fire Insurance (1), I find the law thus stated: "If, therefore, a fire occurs between the time of the sale and the completion of the contract, in the absence of any provision to the contrary, the loss falls upon him (the purchaser); he cannot claim either an abatement for his purchase-money or repudiate his bargain. Neither is the vendor under any obligation to communicate to him whether there is any existing policy or not. The vendor is indeed trustee for him of the legal estate, and of the possession until the purchaser is put into possession, but he is not a trustee to all intents and purposes, so as to place him under the same obligations as might attach upon an express trustee. If there is an insurance existing at the time of the fire, without an express stipulation to that effect, the purchaser cannot claim the benefit of it, and if there is none, it follows that he is not damnified."

That is how the law was stated in 1875.

Therefore, whether we look at actual decision, or whether we rely on the text-books on the subjects, we find the law treated as settled. I do not think I can, in the year 1880, take upon myself to alter what Lord *Eldon* said in 1801, or what Vice-Chancellor *Kindersley* said in 1864.

The action must, therefore, be dismissed with costs.

Solicitors for Plaintiffs: *F. Venn & Son,* agents for *H. Quinn, Liverpool.*

Solicitors for Defendants: *Torr & Co.,* agents for *Anthony & Imlach, Liverpool.*

(1) 2nd Ed. p. 181.

M. R.

1880

March 13;
April 16.

In re CROWE'S TRUSTS.

Practice—New Trustees—Vesting Order as to Stock—No Legal Personal Representative of Survivor of Original Trustees—Trustee Act, 1850, *s.* 25.

The survivor of two trustees of stock under a will having died leaving no legal personal representative, the *cestuis que trust* and two new trustees, who had been appointed under a power in the will, presented a petition asking that the right to transfer the stock—which was then standing in the names of the deceased trustees—might vest in the new trustees, under sect. 25 of the *Trustee Act*, 1850:

The Court made the order—considering itself bound by *In re Dalgleish's Settlement* (1)—but without reappointing the new trustees.

ROBERT CROWE, deceased, by his will, dated in 1851, bequeathed a sum of £1000 consols to two trustees—who were also his proving executors—upon certain trusts.

Both trustees having died, two new trustees were appointed under a power in the will, but as there was no legal personal representative of the survivor of the original trustees, a petition was presented by the *cestuis que trust* and the two new trustees praying that the right to transfer the stock, which was standing in the names of the original trustees, might vest in the new trustees, under sect. 25 of the *Trustee Act*, 1850.

Hatfield Green, for the Petitioners, cited *In re Dalgleish's Settlement* (1).

JESSEL, M.R., made the order as prayed.

The matter subsequently came before his Lordship in Chambers upon an objection by the Registrar that the order asked for was not within the 25th section of the Act—as had been in fact already decided by his Lordship and other Judges, but

HIS LORDSHIP held that, after the decision of the Court of Appeal in *In re Dalgleish's Settlement*, he had no alternative but to let the order go under that section.

Solicitor: *W. W. Wynne.*

(1) 4 Ch. D. 143.

See for form of order 32 W.R. 885 post. 616

ECCLESIASTICAL COMMISSIONERS *v.* COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

V.-C. M.
1880
April 15.

[1880 E. 33.]

Compulsory Purchase—Notice to treat—Several Juries.

Where, under 57 Geo. 3, c. xxix., notice had been served on the owners in fee of four houses requiring them to treat for the sale to the Commissioners of Sewers, the Commissioners will not be allowed to summon a jury to assess the value of one of the houses separately.

THE Commissioners of Sewers of the City of *London,* the Defendants in this case, are, under the Act 57 Geo. 3, c. xxix. s. 80, empowered, for the improvement of the streets, if any houses, walls, buildings, lands, tenements, or hereditaments shall be adjudged by the Commissioners to project into the street, "to treat, contract, and agree, or to employ any person or persons to treat, contract, or agree, with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, and hereditaments of whatsoever nature, tenure, kind, or quality, for the purposes aforesaid, and to pay for the same such sum or sums of money as shall be agreed upon," &c. And by sect. 82 provision is made for summoning a jury to assess the value of the houses, &c., when the person or persons seised or possessed thereof refuse to treat or is under disabilities.

The Ecclesiastical Commissioners for *England,* the Plaintiffs, are owners in fee (subject only to certain agreements for leases) of the pieces of land formerly the sites of Nos. 19, 21, 23, and 25, *Ludgate Hill.* On the 4th of October, 1878, the Defendants served on the Plaintiffs a notice stating it to be the intention of the Defendants to alter, widen, and extend the street called *Ludgate Hill,* and that for that purpose they required to purchase and take all the estate and interest of the Plaintiffs and all persons interested in the piece of land forming the site of Nos. 19, 21, 23, and 25, *Ludgate Hill,* and requiring the Plaintiffs and all persons interested in the said land to treat, contract, and agree with the solicitor of the Defendants for the sale to them of the said land,

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and demanding particulars of the estate and interest of the Plaintiffs and all persons interested in the same, according to the form of the statute 57 Geo. 3, c. xxix.

The Defendants had taken possession of the piece of land forming the site of the four houses, and had thrown part of it into the roadway. There had been much correspondence as to the price of the land, for which the Ecclesiastical Commissioners asked £13,144, but no agreement was come to. In February, 1880, the Defendants issued a warrant to the sheriffs requiring them to summon a jury to assess the compensation, and on the 17th of February, 1880, they served notice on the Plaintiffs that a jury would be summoned according to the directions and provisions of the Act on the 10th of March for the purpose of inquiring as to the value of the piece of land forming part of the site of No. 25, *Ludgate Hill*, and of the proportionate value of the estates and interests of every person interested in the said piece of land, and to assess and award the sums of money to be paid to such person or persons for the purchase of their interests therein.

The Plaintiffs thereupon brought an action claiming a declaration that the Defendants were not at liberty to take any proceedings in pursuance of their said notice to treat, or otherwise to assess the compensation payable in respect of part only of the Plaintiffs' land in such notice mentioned, without at the same time ascertaining the compensation payable in respect of the whole of such lands, and for consequent relief.

The Plaintiffs now moved for an injunction accordingly. There was evidence by surveyors that if the property was assessed piecemeal the amount which the Plaintiffs were likely to receive for their interest would be very materially diminished; and on the other side that there was a separate agreement for a lease as to No. 25, and that the properties ought to be assessed separately.

Bristowe, Q.C., and *B. B. Swan*, in support of the motion :—

The notice to treat includes all this property, and the landowner cannot be harassed by separate inquiries as to each piece of land. How many are there to be? *Stone* v. *Commercial Railway Company* (1); *Abrahams* v. *Corporation of London* (2).

(1) 4 My. & Cr. 122. (2) Law Rep. 6 Eq. 625.

Higgins, Q.C., and *Henderson*, for the Defendants:—

Under this Act we were not bound to give any notice to treat, and we did it only as convenient to the landowner, and that makes a complete distinction between this case and *Stone* v. *Commercial Railway Company* (1). We have adopted this as the most convenient course, as the interests of the lessees have also to be assessed. If the Ecclesiastical Commissioners would apportion the rents there would be no difficulty, but that they have not done. If we go before a jury for the whole we shall have several sets of solicitors and counsel, and great confusion and difficulty. It is absurd to say that the method of assessing will make any difference in the price assessed. There is nothing in the Act to compel us to have one inquiry only. The Commissioners merely mean to have separate inquiries where there are separate tenancies, and not to act oppressively.

MALINS, V.C.:—

For all I know it may be very convenient that this valuation should be made, and very likely from what I have heard it would be so; but all I have to do is to decide upon the strict rights of the parties.

Now, under the Act 57 Geo. 3, c. xxix., the Commissioners of Sewers have powers for widening streets, and in the exercise of those powers they have proceeded to widen to a considerable extent a well-known street called *Ludgate Hill*. On the south side of the street four houses have been taken down and rebuilt further back, and the ground being the property of the Ecclesiastical Commissioners, the Commissioners of Sewers, in pursuance of their Act, have given the Ecclesiastical Commissioners notice to treat for the pieces of ground which were the sites of the houses before they were pulled down. Now Mr. *Higgins* says on the part of the Commissioners of Sewers that it is not necessary for them to give a notice to treat, as the 80th clause of the Act says merely that it shall be lawful for them to treat. Though this is not under the *Lands Clauses Act*, it is a strictly analogous proceeding. They propose to treat by serving on the Ecclesiastical Commissioners a notice that they require these four pieces of land.

(1) 4 My. & Cr. 122.

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It is to all intents and purposes a notice to treat, and under the *Lands Clauses Act* whenever a company having compulsory powers wish to take land, as soon as they have served notice to treat they become owners of the land, and all that has to be done after that is to ascertain the price and complete the contract. In this case the Commissioners have power to take these pieces of land, and they give notice that they intend to take them. Thereupon it is not in dispute that the Commissioners of Sewers become the owners of the land, and they were let into possession and are in possession at this moment. Then what is to be done? Simply to settle the price? This land, like other land, was subject to leases, and wherever there is a lease of the whole property, and part of the property comprised in the lease only is taken, there must necessarily be an apportionment of rent. In this case, therefore, from the very nature of the case as only part of the land comprised in the lease is taken there must be an apportionment of the rent; and I quite agree with Mr. *Bristowe* in saying that the 82nd section of the Act does enable the jury or body fixing the compensation to apportion the rent, and to do everything else which is necessary to ascertain the value. But, having given a notice to treat for four pieces of land, the Commissioners of Sewers find it convenient, according to their view, not to assess the value of the whole of the land for which they have given the notice to treat, and, instead of having one jury to assess the whole, they propose to have several juries. I am very clearly of opinion that that cannot be done. It is said that they mean to have three juries only, but if they have a right to summon a separate jury for any one piece of land, they will have a right to have a separate jury for each of the other three. Indeed I do not know why they should not have a jury for a portion of the soil of any plot, and they may be indefinitely multiplied. Certainly it has been settled in these Courts long ago by the decision of Lord *Cottenham* in *Stone* v. *Commercial Railway Company* (1), that where there is one entire notice to treat, all the procedings subsequent to that must have relation to the whole thing comprised in that notice to treat. The company there attempted to proceed separately, and were restrained by Lord *Cottenham* for reasons which are overwhelming.

(1) 4 My. & Cr. 122.

Where there is a notice to treat—and I consider this is nothing but a notice to treat—everything done under that must be merely for the purpose of completing the entire contract, and not a part of it only.

Then Mr. *Higgins* says that the Defendants are entitled to state their reasons, but I do not think that they state any reasons at all. The Plaintiffs demand £13,144 for the fee simple of the entire plot. If the Commissioners choose to accede to that and pay the £13,144, the property is theirs. In fact it is theirs at all events, and the only thing to ascertain is how much they are to pay for it. If the Ecclesiastical Commissioners, who are the landowners, make an erroneous statement, the grounds of their claim may be rejected, and they may receive a less sum.

I am clearly of opinion that this is analogous to the case of *Stone* v. *Commercial Railway Company* (1), and that the Commissioners of Sewers must summon a jury, and one jury only, to assess the value of the whole of that which the notice to treat includes.

With regard to *Abrahams* v. *Corporation of London* (2), I have only one word to add. That case decides that where there are distinct interests, for instance, in the case of landlord and tenant, you cannot compel the landlord and tenant to go to the same jury; they have each separate interests, and each may have a separate inquiry. Here, having given a notice to treat for the four plots of land, they proceed to summon a jury to assess the value of the fee of one of them only. That I restrain, because the jury summoned must be a jury to assess the value of the whole, and not of any one of them.

Solicitors for Plaintiffs: *Jennings-White & Buckston.*
Solicitor for Defendants: *A. J. Baylis.*

(1) 4 My. & Cr. 122. (2) Law Rep. 6 Eq. 625.

V.-C. M.
1880
April 16.

In re LIDDIARD.

New Trustees—Persons out of the Jurisdiction.

Where all the *cestuis que trust* are resident out of the jurisdiction, the Court will appoint new trustees resident out of the jurisdiction.

THIS was a petition for the appointment of new trustees under the will of *H. W. W. Liddiard*. His residuary estate amounted to about £6000, invested in English railways, and was divisible in shares amongst his children and their issue, some of whom were infants. All of them were resident in *Australia*, and the Petitioners proposed to appoint as trustees two persons who were resident in *Australia*, and who would sell the English investments and invest the money in *Australia*.

W. Barber, in support of the petition, mentioned the cases of *In re Wayre* (May 18, 1877) and *In re Cunard* (November 8, 1878), both before Vice-Chancellor *Malins*, in which persons resident out of the jurisdiction had been appointed.

MALINS, V.C., made an order appointing the two persons proposed.

Solicitors: *Field, Roscoe, & Co.*

COOPER *v.* THE QUEEN.

V.-C. M.
1880
April 19.

[1879 C. 368.]

Civil Service—Pension—Jurisdiction—4 & 5 *Will.* 4, *c.* 24, *s.* 30; 22 *Vict. c.* 26, *s.* 2.

Under the Acts regulating the superannuation allowances of the Civil Service, the decision of the Commissioners of the Treasury as to the amount of an allowance is final, and no Court of law has jurisdiction in the matter.

THIS was a demurrer to the Petition of Right of *Charles Cooper*, formerly in the Civil Service of Her Majesty. The petition shewed that the suppliant received his first appointment in Her Majesty's service on the 1st of October, 1844, and in the following year was selected to fill the office of religious instructor on board convict ships at pay, allowances and emoluments, equivalent to £400 a year. That additional allowances were afterwards given to him. That on the 31st of October, 1853, his services ceased together with the salary and allowances on account of the office being abolished. That on the 7th of November following the suppliant was appointed scripture-reader at *Portland Prison* at a salary of £100 a year, which gradually increased to £186. That prior to the year 1859 cases of abolition of office in Her Majesty's service very rarely occurred, but when such an event did take place, if the person holding the same had entered the tenth year of his service, he was invariably granted a compensation allowance in proportion to the length of time he had served, and the average amount of the salary and emoluments he had received during the three years last preceding such abolition of office. If he was subsequently re-employed in an office of less value than the one formerly held by him, the income was made equal to that of the former office by so much of the said compensation allowance being added, and if not sufficient, a further yearly sum was granted to make it so, or if the service was continuous and any of the emoluments were reduced or ceased, then an allowance was granted in accordance with their average value for the three last preceding years. That no compensation or other allowance whatever was

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granted to the suppliant on account of loss of the remaining personal emoluments which were formerly allowed him, although cases are recorded precisely similar in circumstances where it has been granted. That in 1865 the office of scripture-reader was declared vacant to the suppliant by the Directors of Convict Prisons; and no employment or other office of a like nature to that in which he had been engaged for nineteen years was found for him. The suppliant did not resign, and as his said office was not abolished (although he was led to believe and did believe it was) he applied for and obtained permission to retire from Her Majesty's service on superannuation. That upon retirement the suppliant received a superannuation allowance of £65 2*s.*, being twenty-one sixtieths of £186. That since the year 1859 it had been the practice whenever any person was removed from an office in Her Majesty's service for the purpose of facilitating improvements by which greater efficiency could be obtained, or for the purposes of reduction, revision, abolition, or convenience of the service, to add a recognised period of time to that actually served for the purpose of calculating a compensation allowance for loss of office; if the person holding such office retired from service after twenty years, ten years were added to the time he had actually served for the purpose of compensating him; no period was added to the time served by the suppliant, but the full ordinary rate of pension was granted to him. That when his office was abolished in 1853 he was entitled to a compensation allowance for loss of office: and that when subsequently appointed to an office of less value than the salary and emoluments formerly enjoyed by him, he was entitled to have the income of such new office made equal in value to such salary and emoluments; and that upon his retirement the amount of superannuation allowance awarded to him should have been calculated upon the total amount of such salary and emoluments, and that a period of ten years should have been added to the time of his actual service for the purpose of calculating such superannuation allowance. That in the years 1853 and 1854 the suppliant made application to the then chairman of the Board of Directors of Prisons for the compensation to which he then claimed to be entitled for the reasons above assigned; but the said chairman in reply expressed his regret that he could not recommend

the suppliant for a compensation allowance, because when his duties as religious instructor on board convict ships ceased he had not completed ten years' service. That the suppliant, believing that for the reasons aforesaid he was debarred from obtaining such compensation, made no further claim until the year 1875, when he first learned that other persons who had entered their tenth year of service prior to 1853 had been allowed such compensation on the abolition of their respective offices before ten years' service was completed. Upon ascertaining this fact the suppliant, in June, 1875, set forth his case in a memorial which was sent to the Treasury through the Home Office, and in the following month their Lordships replied that they saw no grounds for increasing the said pension. In July, 1876, a letter was addressed to the Secretary of State for the Home Department relating to the suppliant's case, and in March, 1877, a reply was received to the effect that his claims had again been forwarded to the Treasury, and their Lordships had replied to the two salient points submitted to them by the said Secretary of State, that as twenty-three years had elapsed since the suppliant's transfer from a higher to a lower office, and no claim had been recommended for compensation, they inferred that the suppliant was not at that time entitled to a compensation allowance on that account. Their Lordships also replied that several allowances enjoyed by the suppliant could not have been calculated in his pension.

And the suppliant prayed for a declaration that on the abolition of his office in 1853 he was entitled to compensation for loss of office; or, had his service been continuous, he was entitled to compensation allowance for loss of emoluments, and that when he was removed from office in 1865 he was entitled to compensation for such removal. That it might be declared that the annual sum awarded to him in 1865 by way of superannuation allowance should have been calculated on an income which included the value of such compensation allowance as might be ascertained to have been due to him, in addition to the salary of his then office from 1853 to 1865. That the amount due in respect of the difference might be ascertained and declared payable to him.

The Attorney-General, on behalf of Her Majesty, demurred generally.

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Sir *J. Holker*, A.G., and *Rigby*, in support of the demurrer:—

Whether the suppliant has been hardly used or not, he must on this petition shew some statutory right, but in the only two statutes on the subject, 4 & 5 Will. 4, c. 24, s. 30, and 22 Vict. c. 26, s. 2, are clauses expressly making the decision of the Commissioners final. The whole matter is left to their discretion, and no Court of law has power to interfere.

[MALINS, V.C., referred to *In re Tufnell* (1).]

J. Pearson, Q.C., and *Macmorran*, for the suppliant:—

No doubt the Commissioners cannot be compelled to grant a pension, but when they have determined that a pension ought to be given, and have made a mistake in the amount, it would be shocking if the mistake could not be set right. The case of the suppliant is that a mistake has been made in the amount of his pension, and there must be some means of correcting that mistake. Suppose that an obvious arithmetical mistake had been made: *Rustomjee* v. *Reg.* (2). It is clear that in calculating the amount of the pension the emoluments ought to have been taken into account: *Reg.* v. *Postmaster-General* (3).

MALINS, V.C.:—

This is a case in which, in my opinion, the demurrer must be allowed, and there is no excuse whatever for the suppliant applying to this Court. He has been admitted to be entitled to a superannuation allowance, and such allowance was granted to him in the year 1865, being £65 2*s.* per annum, or twenty-one sixtieths of the salary of £186 which he had in the public service. Now this right to superannuation allowance is a very peculiar right. As I read the Acts of Parliament, it is a right which can never be enforced in the civil tribunals of this country. The Act of 4 & 5 Will. 4, c. 24, enacts that certain civil servants shall be entitled to certain allowances after certain periods of service. The shortest period seems to be ten years, and any officer, clerk, or person who shall have served ten years and upwards, and under fifteen years,

(1) 3 Ch. D. 164. (2) 2 Q. B. D. 69.
(3) 3 Q. B. D. 428.

is to have an annual allowance not exceeding in amount four-twelfths of the annual salary and emoluments of his office; and then the Act goes on to provide allowances for services, increasing in amount according to length of service. A servant of the Government, therefore, has rights conferred on him; but all those rights are dependent entirely upon the bounty of the Commissioners, and in order to guard themselves, and to prevent claims like this from being made before the civil tribunals of the country, the Act provides, sect. 30, "Nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Commissioners of His Majesty's Treasury and the heads or principal officers of the respective departments of their power and authority to dismiss any person from the public service without compensation." The Crown, in fact, says, "This is what we intend to give you, but as a matter of bounty only, and you shall have no legal right whatever, and it is not intended to give any person an absolute right of compensation for past services or for allowances under this Act." He must therefore depend upon the bounty of the Crown whether he is to have the whole amount or any part which the Commissioners may think fit, or what they will take into consideration, or what they will not.

Now this is made still more clear by the Act of 22 Vict. c. 26, which in point of fact is a declaratory Act, and is made expressly to form part of the Act of 4 & 5 Will. 4, c. 24. That Act again provides for the granting of superannuation allowances, and describes a scale according to the length of service, which scale was taken into consideration in the present case by awarding to the suppliant twenty-one sixtieths of the salary he had been receiving. Then, in order to provide that these rights are not to be enforced in the civil tribunals of the country, the 18th section enacts that "so much of the said Act of 4 & 5 Will. 4, c. 24, as is now in force and is not hereby repealed and this Act shall be construed together as one Act." Therefore it virtually re-enacts the 30th section of the former Act, which provides that these shall not be legal rights; and to remove all possibility of doubt on the subject the 2nd section provides that "if any question should arise in any department of

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the public service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final." Now, Mr. *Pearson* says, the suppliant does not claim a superannuation allowance, for that has been granted, but he makes a claim on the ground of a mistaken principle on which the amount of the allowance was calculated, and says that they ought to have taken into consideration certain emoluments. I agree with the view expressed in the case of *Reg.* v. *Postmaster-General* (1), that emoluments should be taken into consideration, and it may be that a mistake was made, but still it is provided in the Act most distinctly that any such question shall be referred to the Commissioners of the Treasury, whose decision shall be final. Now, the statement is this:—[His Lordship then read the statements in the petition as to the applications made by the suppliant.] Therefore his own statement is that he has submitted this very claim for an increased pension to the Lords of the Treasury, and they have considered it and see no reason for increasing the pension, and their decision is, as the Act says, to be final.

I am, therefore, clearly of opinion that no claim for superannuation allowance to persons under those Acts can in any case be enforced by the civil tribunals of the country, and that the civil servants must rely upon the decision of the Lords of the Treasury, who will say whether they will take the claim into their favourable consideration or not. But whether they do or do not err in their decision, it is made by the Act of Parliament absolutely conclusive and binding. There is no excuse therefore for having brought this matter before the Court, and the demurrer must be allowed with costs.

Solicitors for Suppliant: *Thomson & Ward.*
Solicitors for the Solicitors to the Treasury: *Hare & Fell.*

(1) 3 Q. B. D. 428.

In re WEST OF ENGLAND BANK. *Ex parte* BOOKER.

V.-C. M.
1880
May 1.

Joint Stock Bank—Guarantee—Directors—Ultrà Vires.

The directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers and to act in such manner as might appear to them best calculated to promote the interest of the bank, have, when the formation of another company is of importance to the bank, power to guarantee the payment of interest on debentures of that company issued for the purpose of forming it.

THE *West of England and South Wales District Bank* carried on business at *Bristol* and other places under the provisions of a deed of settlement dated the 9th of February, 1835 (1). Through

(1) The clauses of the deed of settlement which were principally relied upon in argument were these:—

"2. That the business of this company shall be exclusively confined to banking in all its branches and departments, including the issuing of promissory notes, bank notes, bills of exchange, and other negotiable documents, making loans and advances to customers and other persons, either on open accounts or upon real or personal securities, bills of exchange, promissory notes, or letters of credit, or on mortgages on the deposit of deeds, goods, wares, or merchandize, discounting bills of exchange and promissory notes payable at or after sight, after date, or on demand, borrowing or taking up money on receipts, bills, promissory notes, and other obligations, and also including purchase, investments, dealings or sales in or upon the government or any public stocks or funds, Navy or Exchequer Bills, *India* Bonds, Bank or *East India* Stock, shares in the capital or stock of this company or any other joint stock banks, or of any chartered or incorporated company, freehold, copyhold, customary freehold, or leasehold securities in *England*, *Ireland*, or *Wales*, or in or upon any other securities or property which the general board of directors for the time being shall think fit and proper, except in foreign stock, loans, or bonds, and including generally all such other business and transactions as are usual in banking establishments of the like nature, and as are or shall be consistent with the laws now or hereafter to be in force concerning joint stock banking companies; but this company shall not be concerned in any other adventure, trade, or business whatsoever, and shall be so conducted as not to contravene any of the provisions of the said Act."

"35. That in all cases not expressly provided for by this deed, or to be provided for by some supplementary deed or deeds of settlement, it shall be lawful for the general board of directors for the time being to act in such manner as may appear to them best calculated to promote the interest and welfare of the company."

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the *Cardiff* branch of the bank they had made large advances to a firm of tin-plate makers called *Thomas W. Booker & Co.*, these advances amounting to upwards of £100,000, and the bank put pressure on *Thomas W. Booker & Co.* to transfer their business to a limited company. A company called *Booker & Co., Limited,* was accordingly formed and registered. The limited company was to give £425,000 for the works, £150,000 of which was to be in the shape of debentures, which, though originally issued in the names of *Booker & Co., Limited,* were almost immediately transferred to Messrs. *Murch* and *Leonard* as trustees for the bank.

A Mrs. *Georgina Booker* was interested in the property of *Thomas W. Booker & Co.*, and, as was stated in an affidavit made by her, she joined in the conveyance of the property to *Booker & Co., Limited,* in consideration of having £18,000 of the debentures transferred to her, payment of the interest on which was to be guaranteed by the bank. Accordingly, eighteen debentures of £1000 each were transferred by *Murch* and *Leonard* to Mrs. *Booker*, and a guarantee was given to her under the seal of the bank and in the following terms:—

"To Mrs. *Clara Georgina Booker*. Madam,—Referring to the transfer executed by Messrs. *Murch* and *Leonard* in your favour of the debenture or bonds mentioned or set forth in the schedule hereinunder written, and to the agreement entered into upon the negotiation for such transfer, we, the *West of England and South Wales District Bank*, do hereby, in the event of the borrowers, *Thomas William Booker & Co.*, making default in the payment of the interest on such debenture or bonds as and when they respectively become due, (*sic*) to pay to you such interest on such default as aforesaid. Dated this 18th day of January, 1876."

The company did not pay all the interest on the debentures, and the bank had paid it until the bank stopped payment on the 7th of December, 1878. An order was subsequently made for winding up the bank, and Mrs. *Booker* took out a summons in the liquidation to be admitted as a creditor against the estate of the bank for £18,000, the estimated amount of the guarantee.

Higgins, Q.C., and *Macnaghten*, Q.C., in support of Mrs. *Booker's* claim:—

Mrs. *Booker* was the owner of property, and would not have made it over to the new company unless the bank had given this guarantee. It was of importance to the bank that the tin-plate works should be transferred to a limited company, and this guarantee was given accordingly. It is said that, as bank directors, they had no power to give a guarantee, and that it is void as against the estate, but that is not so. The directors had full power to do such things for the benefit of the bank, and there is no suggestion that this was not the best thing they could do: *Lindley* on Partnership (1). The bank might have given her cash, or have endorsed a promissory note by *Booker & Co.*, and where is the difference: *National Exchange Company* v. *Drew* (2); *Meux's Executors' Case* (3). Mrs. *Booker* was not bound to examine the deed of settlement of the bank. Besides, the thing has been done, and the bank has had the benefit of it, and cannot now restore her to her original position: *Phosphate of Lime Company* v. *Green* (4); *In re Sea Fire and Life Assurance Company* (5).

Glasse, Q.C., and *Romer*, for the liquidator:—

A guarantee is not within the powers of partners: *Brettel* v. *Williams* (6); *Sandilands* v. *Marsh* (7). The powers of the directors are very fully stated in the deed of settlement, and giving a guarantee is not included: *Duncan* v. *Lowndes* (8). *Ex parte Gardom* (9) is overruled. We have no evidence of what a banker's business is, and can look only at the deed. If a banker endorses a bill he makes a profit on the transaction, but none was made here. This was engaging in another business, which the directors were expressly prohibited from doing. As to the analogy between this and endorsing a promissory note, an act which is *ultrà vires* cannot be supported by shewing that some other act would not

(1) 4th Ed. vol. i. p. 250.
(2) 2 Macq. 103.
(3) 2 D. M. & G. 522.
(4) Law Rep. 7 C. P. 43.
(5) 5 D. M. & G. 465.
(6) 4 Ex. 623.
(7) 2 B. & A. 673.
(8) 3 Camp. 478.
(9) 15 Ves. 286.

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have been so, and if an act is *ultrà vires* it cannot be confirmed: *Ashbury Railway Carriage and Iron Company* v. *Riche* (1).

Malins, V.C.:—

The transaction with which I have to deal, as far as I can gather, is to be collected best from the document on which Mrs. *Booker* relies. It purports to be a guarantee of this company, the *West of England Bank*, to pay her the interest on debentures to the extent of £18,000. Mr. *Glasse* has been instructed to admit, very properly, that it was intended as a guarantee, and the question is whether, being a guarantee, it is binding on the company which executed it. Now, the words of the document are these:—[His Lordship then read it.]

From this document I collect that the bank had held these debentures, and that Messrs. *Murch* and *Leonard*, two of the directors of the bank, handed them over to this lady; that she not having perfect confidence in *Booker & Co.*, the bank said to her, "If you will take these debentures in payment, we will guarantee you the payment of the interest on them." It may have been prudent or imprudent, but still it was a banking transaction, and I must upon the face of this document assume that to have been done which it states to have been done.

Mrs. *Booker's* affidavit gives a somewhat fuller account of the transaction. She says that at the request of the *West of England Bank* she joined in conveying and assuring certain property in which she was interested to *Booker & Co., Limited*, in consideration of having these debentures transferred to her and guaranteed. But why did the bank desire this property to be conveyed to *Booker & Co., Limited?* Plainly to my mind because *Thomas W. Booker & Co.* were indebted to them, and anything that would improve the condition of *Booker & Co., Limited*, increased the probability of their debt being paid. Therefore, having these bonds, and desiring to have this arrangement made, it was, in my opinion, within the power of the directors to enter into that agreement. They certainly had power to take the debentures, and having taken the debentures, it was within their power to dispose

(1) Law Rep. 7 H. L. 653.

of them. Suppose they had wished to dispose of these debentures, and had said, "If you will take these debentures at 50 per cent., we will guarantee you 50 per cent.," that would have been within their power.

There is no evidence given here as to the custom of bankers, and in the absence of evidence I am obliged to come to a conclusion upon the transaction itself. The powers given by the deed of settlement are of the largest description, and the directors are to deal with money, to advance money, to take money from their customers, to indorse bills, and to do everything, in fact, which in the fair meaning of the thing is connected with money. Every power that a banker could possibly desire to exercise is given by this deed to this company. Whether a partnership is bound by the act of an individual member depends upon whether it is within the scope of the partnership, and all the cases cited depend upon that fact. In *Brettel* v. *Williams* (1) one member of the firm guaranteed that coal should be supplied, and that was certainly not within the scope of the partnership business. It is clear the act of one partner is not binding on the others unless the transaction is within the scope of the partnership; but if it is, then what one does is binding on the others, just as if they had all joined in it. In the case of *Ashbury Railway Carriage and Iron Company* v. *Riche* (2) the transaction was not binding on the other shareholders, because it was embarking in a totally different business. The company was constituted to build railway carriages at *Birmingham*, and the directors took the capital and used it in making a railway in *Belgium*. It was decided not only that it was not within their power, but that no acquiescence of the shareholders in what was done would bind them. But this was the act of the directors, who have only such powers as the shareholders confer on them, and they have conferred on the directors the power of conducting every kind of banking business. The 2nd clause of the deed is in most ample terms, and if there is any doubt about it, it is explained by the 35th. They are not to go into any other business, but whatever they think in the business of bankers is for the benefit of the company, that they are at liberty to do, and it is binding on the company. Therefore,

(1) 4 Ex. 623. (2) Law Rep. 7 H. L. 653.

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looking at the nature of the transaction, and seeing that the company held these debentures, that they desired to get rid of them, and desired to strengthen *Booker & Co.*, I am of opinion that it was within the scope of the business of the company.

Solicitors for Mrs. *Booker: Cunliffe & Co.*, agents for *R. W. Williams, Cardiff.*

Solicitors for Liquidator: *Clarke & Co.*, agents for *Fussell & Co., Bristol.*

In re METROPOLITAN STREET IMPROVEMENT ACT, 1877.

Ex parte CHAMBERLAIN.

V.-C. B.
1880
March 13.

Lands Clauses Act, 1845, *s.* 79—*Person absolutely entitled—Payment out—Adverse Possession—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 3, 5.

A person shewing title by adverse possession for twenty-six years after the expiration of a term for 192 years to land taken under the provisions of the *Lands Clauses Act*, 1845, will, in the absence of any claim by, or evidence of the existence of, the reversioner, be deemed to be the owner of the land, and entitled to the purchase-money under the *Lands Clauses Act*, 1845, s. 79.

PETITION for payment out of Court of purchase-money which had been deposited under the provisions of the *Lands Clauses Act*, 1845.

Certain house property in *Bermondsey*, of which *B. T. Chamberlain* was the ostensible owner in fee, was taken by the Metropolitan Board of Works in February, 1878, under the powers of the *Metropolitan Street Improvement Act*, 1877, with which the *Lands Clauses Act*, 1845, is incorporated.

An abstract was furnished commencing with the will of *Henry Gough*, who died in 1852. The trustees of *Gough's* will sold the property to *Sarah Davies*, who died in 1874, having by her will devised the property to trustees for sale. From these trustees *Chamberlain* purchased the property in 1875 as freehold.

Upon further investigation it appeared that *Henry Gough's* interest in the property was leasehold only, as he was entitled, not as owner in fee, but, under a term of 192 years created in 1662, which expired on the 25th of March, 1854.

The Metropolitan Board thereupon required proof that, as *Chamberlain's* title depended upon adverse possession since the 25th of March, 1854, the owner of the reversion expectant upon the expiration of the 192 years term was not under any disability. In reply to this requisition, *Chamberlain* insisted that he was not liable to adduce such proof, and in fact could not do so, being ignorant as to who was entitled to the reversion.

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The purchase-money having been paid into Court by the Metropolitan Board, *Chamberlain* had presented this petition for payment out to him of the purchase-money as the person in possession as owner under the *Lands Clauses Act*, 1845, s. 79.

Hemming, Q.C., and *Renshaw*, for the Petitioner:—

The Petitioner, who has shewn a title for twenty-six years, and was in possession of the land as owner at the time it was purchased, is, under sect. 79, to be deemed to be lawfully entitled until the contrary be shewn to the satisfaction of the Court, and, as this has not been done, he is entitled to payment of the deposited purchase-money.

F. Pownall, for the Metropolitan Board:—

A person whose title is bad, and who is merely in possession of land, is not an owner within the meaning of the *Lands Clauses Act*, sects. 76, 79: *Douglass* v. *London and North Western Railway Company* (1); and is not the person entitled under sect. 79 to have the money paid out to him. The reversioner may turn up at any moment, and until the title of the Metropolitan Board becomes absolute by adverse possession, which will not take place until 1884 (*Real Property Limitation Act*, 1874, 37 & 38 Vict. c. 57, ss. 3, 5), the Court ought not to part with the money.

BACON, V.C.:—

In my opinion no one can complain that the Metropolitan Board of Works have appeared and taken an objection to the application for payment of this money out of Court. One great fallacy, I think, in the argument was in endeavouring to assimilate this case to the ordinary case of vendor and purchaser without any reference to the Act of Parliament. There is no doubt that a vendor cannot force a bad title upon a purchaser. This case is wholly free from that. The vendor here relies upon the statutory title conferred upon him by sects. 76 and 79 of the *Lands Clauses Act*, and says that they make for him a good title. Sect. 79 says such person "shall be deemed to have been lawfully entitled to

(1) 3 K. & J. 173.

such lands until the contrary is shewn to the satisfaction of the Court." That is his title. He proves his possession. Who shews anything to the contrary to the satisfaction of the Court, or to the satisfaction of anybody else? In answer to the objection that there may be a person under some of the disabilities mentioned in the *Real Property Limitation Act*, 1874, who may hereafter make such a claim, the vendor says, I know of no such person, and I do not care to find any such person if he exists, but I rely upon sect. 79, which says the fact of my possession shall be proof of my true title unless the contrary is shewn. That forces nothing upon the vendor. The purchaser takes by virtue of the section in the *Lands Clauses Act*, that property of which the vendor is in possession, and of which, from the fact of his possession, he is to be deemed to have been lawfully entitled "unless the contrary be shewn as aforesaid." Now, I ask where is there a particle of evidence to shew that which the statute requires? I do not think the case cited, *Douglass* v. *London and North Western Railway Company* (1), is in the slightest degree applicable to the point I have to determine on the present occasion. I think the Petitioner has made a good title under the Act of Parliament to that land of which the board has taken possession, and consequently to the money which the board has paid in under the Act. Costs according to the Act.

Solicitors: *W. Easton; Solicitor to the Metropolitan Board of Works.*

(1) 3 K. & J. 173.

V.-C. B.
1880
May 8.

SWAINE *v.* DENBY.

[1880 S. 58.]

Partition—Sale—Partition Act, 1868 (31 & 32 *Vict. c.* 40)—*Overriding Trust.*

10 LR D 201
202.

When the testator has himself fixed the period at which the trustees of his will are to sell his real estate and divide the proceeds, the Court has no jurisdiction to anticipate that period by directing a sale in a partition action at the request of persons equitably entitled to an undivided moiety of the property.

DEMURRER.

Jonas Denby, being seised in fee simple of certain freehold hereditaments, consisting of freehold cottages, by his will, dated the 4th of December, 1847, devised all his real estate unto his executors, *Thomas Court*, *George Rushton*, and his son, the Defendant *Jonas Denby*, their heirs and assigns, upon trust "to pay the rents and produce thereof unto my sons the said *Jonas Denby* and *Holmes Denby* for and during their respective natural lives in equal shares as tenants in common and not as joint tenants, or otherwise permit and suffer them to receive the same to and for their own use and benefit. And in case of the death of either of them the said *J. Denby* and *H. Denby* without lawful issue, I give and devise the whole of the said last mentioned premises unto the survivor of them, his heirs and assigns, for ever. In case of the death of either of them leaving lawful issue, the rents, &c., which had been previously paid to the one so dying shall be paid to such issue, and if more than one, equally to be divided between them share and share alike until the death of my other son. And from and after the death of the survivor of my two sons I hereby direct that my said trustees or trustee for the time being do and shall when and as they or he shall in their or his discretion think fit, sell and dispose of such part of my said real estate as is hereinbefore devised for the benefit of my said two sons either by public auction or private contract," with directions for division of the proceeds equally amongst the children of *Jonas* and *Holmes*; and in case the survivor should have died without issue living at his death the whole of the proceeds to be equally divided

amongst the children of his other son, if any, share and share alike.

The testator died in March, 1850.

Holmes Denby died on the 10th of March, 1878, leaving two children, Mrs. *Swaine* and Mrs. *Chadwick*, the present Plaintiffs.

The Plaintiffs, being entitled to a moiety of the hereditaments, desired a sale in lieu of partition, and by their action requested a sale of the entirety; an account of rents and profits since the death of *Holmes Denby;* a receiver, and an administration of the trusts of the testator's will (if and so far as necessary) under the direction of the Court.

The statement of claim averred that in February last, in reply to an application for an account of the rents of the property, the Defendant *Jonas Denby* proposed to the Plaintiffs to sell the property if they would consent, and to distribute the proceeds in the manner directed by the will. A sale could not, however, be effected without the aid of the Court.

To so much of the claim as sought an immediate sale the Defendants, the trustees, of whom *Jonas Denby*, the surviving son, was one, had demurred.

Birrell, in support of the demurrer:—

The testator having himself indicated the period when the property is to be sold by his trustees, that period cannot be accelerated: *Dart's* Vendors and Purchasers (1); and the Court has no jurisdiction, by making a decree for partition or sale, to put an end, during the lives of his sons, to the trusts which he has directed in respect of this property and which are still subsisting: *Taylor* v. *Grange* (2).

Dunning, for the Plaintiffs:—

The Plaintiffs, who are equitable tenants in fee simple of an undivided moiety, are not by their action asking the Court to accelerate the period which the testator has fixed for selling the property, but are seeking to obtain, under the *Partition Act* of 1868, relief by sale instead of the decree for partition to which they would have been entitled before that Act. If the Plaintiffs

(1) Page 63. (2) 13 Ch. D. 223.

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had been legal devisees without the intervention of trustees, it will not be disputed that they would be entitled to a decree for partition which would bind those entitled in remainder: *Gaskell* v. *Gaskell* (1); *Hobson* v. *Sherwood* (2); *Baring* v. *Nash* (3). And where the legal estate is, as here, before the Court, persons having the equitable estate are equally entitled to a decree for partition, which can be carried out by proper conveyances. In *Taylor* v. *Grange* (4) a sale or partition must at once have put an end to the testator's directions for continuing the business, and have divided the property inconsistently with the exercise of the powers given to the trustees for working the quarries on the estate. Here that objection does not arise, as the property consists of cottages only; there is no active trust which will be put an end to, and the proceeds will be divided according to the directions of the testator.

BACON, V.C., said that the demurrer must be allowed. The will was as plain as anything could be. After devising the legal estate to trustees on trust to pay the rents and profits to his sons equally during their lives and to the surviving son and the issue of the son who died leaving issue, the testator had himself pointed out the time when it might be convenient to put an end to the trusts by selling the property and dividing the proceeds. Until that period arrived there was no jurisdiction in the Court to direct a sale.

Demurrer allowed with costs.

Solicitors: *Emmett & Son*, agents for *C. B. Cottam, Bradford, Yorkshire; J. Frankland.*

(1) 6 Sim. 643.
(2) 4 Beav. 184.
(3) 1 V. & B. 551.
(4) 13 Ch. D. 223.

BUTLER *v.* BUTLER.

V.-C. B.
1880
May 8.

[1879 B. 59.]

Practice—Pleading—Notice of Claim between Co-Defendants—Rules of Court, 1875, *Order* XVI., *r.* 17.

In an action by *A.* against his trustees, *B.* and *C.*, to make them jointly and severally liable for the loss occasioned by an investment on insufficient security, in breach of trust, of the trust fund, *B.*, in his statement of defence and counter-claim, claimed contribution from *C.*, as the trustee primarily liable for the alleged breach of trust, if established.

The defence was delivered to *C.*, but there was no order that that should be sufficient notice.

A decree for an account and payment having been made against *B.* and *C.*:—

Held, on further consideration, that *C.* had sufficient notice within Rules of Court, 1875, Order XVI., rule 17, of *B.'s* claim for indemnity; and that *B.* was entitled to an inquiry how and in what proportions, as between *B.* and *C.*, the sums ordered to be paid to *A.* should be borne and paid.

FURTHER CONSIDERATION.

The Plaintiffs, who were beneficially entitled under the will of *John Butler*, deceased, by this action, instituted in February, 1879, claimed a declaration that certain investments on mortgage of the trust property, made in 1868 and 1869, were improper investments, and breaches of trust on the part of the Defendants, *John Butler* and *Walter Butler* (the trustees); a declaration that they were jointly and severally liable to make good the moneys for the benefit of the Plaintiffs, and payment of the same to the Plaintiffs, with all arrears of interest.

John Butler raised the case that the trust moneys had been invested upon the particular securities at the instance and with full knowledge and assent on the part of the Plaintiffs, and by his counter-claim he claimed payment from the Plaintiffs of sums amounting to £289 18*s.* 6*d.*, alleged to have been expended by him for repairs of the mortgaged property; and in his statement of defence, not admitting that the particular investments were improper or breaches of trust, but if the Court should consider that such investments were improper, he submitted and claimed that, as between him and the Defendant *Walter Butler*, the Defendant

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Walter Butler was primarily liable to make good the same sums and the interest thereof; and he claimed to be entitled to be repaid by *Walter Butler* the £289 18*s.* 6*d.* paid for repairs, and to be indemnified by the same Defendant against any sum which might be recovered in this action from him (*John Butler*) in respect of the interest on the said sums, and also in respect of the principal of such sums; and if the Court should consider that he (*John Butler*) was not entitled to be wholly indemnified by the Defendant *Walter Butler*, then he claimed to be entitled to contribution from the Defendant *Walter Butler* to such extent as the Court might think proper of any sum which he (*John Butler*) might be adjudged to pay in this action in respect of the said sums, or the interest or the investments thereof.

This defence was delivered to *Walter Butler*, but there was no order that such delivery should be sufficient notice, or that the question between the Defendants should be determined in this action. *Walter Butler*, in his statement of defence, as between himself and the Plaintiffs, admitted his liability to make good any loss that might arise from the securities (upon which the trust funds were invested) proving to be deficient. As between himself and his co-Defendant *John Butler*, he had always admitted and did admit his liability to make good his proportion of any such loss, but the Defendant *John Butler*, as between himself and the Defendant *Walter*, had always repudiated any liability to make good any portion of such loss, and he claimed, as against the Defendant *John Butler*, a fair and just contribution to the loss, if any, occasioned by the securities being deficient, and to be indemnified against the costs of the action.

In reference to the investment of the trust funds upon mortgage in 1868 and 1869, in respect of which the Plaintiffs claimed relief in this action, *John Butler* had, in January, 1875, filed a bill against *Walter Butler* (and the representative of *Jane Sarah Butler*, the testator's widow and one of his trustees and executors), alleging that he was induced by the solicitations of *Walter Butler* to make the advances, and only agreed to an advance on condition that *Walter Butler* should be personally liable for repayment; and that the mortgaged houses were a very insufficient security for the debt. This bill prayed that the mortgage securities might be

realized, and that *Walter Butler* might be decreed to make good to the estate of the testator, if necessary, the principal moneys and interest due on the mortgages.

In May, 1877, Mr. Justice *Fry* held that the Plaintiff *John Butler* had failed in establishing any case for making *Walter Butler* primarily liable, and that the Court would not direct a sale in the absence of the *cestuis que trust*, and dismissed the bill with costs: see *Butler* v. *Butler* (1). On appeal this decision was affirmed (2).

At the hearing of the present action in November, 1879, Vice-Chancellor *Bacon* held that the investments in question, of trust moneys upon houses in course of building, were clearly improper, and a breach of trust for either of the trustees to have been engaged in; and that it was not shewn that the *cestuis que trust* knew of or assented to the investment of their money upon an insufficient security. His Lordship continued: "The Plaintiffs have clearly made out a case of breach of trust against the two trustees. They are plainly entitled to have the money so improperly invested repaid and reinvested, with interest from the time when it was last paid. For that purpose there must be an inquiry, and beyond that I have nothing to do with it. The quarrel between these two brothers (*John* and *Walter Butler*) as to the degree in which each is liable to contribute is not a matter to be decided in this suit, and they must settle that as best they can. After payment has been made under this decree in order to recoup the trust fund, if there is any equity subsisting between the two brothers that equity must be worked out in such manner as the brothers think best, having regard to their own respective interests."

A decree was accordingly made declaring that the particular investments were improper investments, and breaches of trust on the part of the Defendants, *John* and *Walter Butler*, and that the Defendants were jointly and severally liable to make good such sums with interest at 5 per cent. for the benefit of the Plaintiffs; and directing an account of what was due in respect of such sums and interest, and payment by the Defendants, *John* and *Walter Butler*, to Plaintiffs of the Plaintiffs' costs of the action.

(1) 5 Ch. D. 554. (2) 7 Ch. D. 116.

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The case now came on upon further consideration, and the Defendant *John Butler* asked for an inquiry how and in what proportions, as between the Defendants *John* and *Walter Butler*, the sums ordered to be paid to the Plaintiffs were to be borne.

Mackeson, Q.C., and *E. Williamson*, for the Plaintiffs.

Horton Smith, Q.C., and *Nugent*, for *John Butler* :—

We submit that we are entitled to the inquiry we ask for. Although, as between themselves and their *cestuis que trust*, both Defendants are severally responsible for the whole loss occasioned by the breach of trust, they are entitled to contribution: *Fletcher* v. *Green* (1); *Lewin* on Trusts (2); and this right may, since the *Judicature Act*, 1873, s. 24, sub-ss. 3, 7, be enforced in the same action: *Seton* (3), without driving either of them to bring an action against his co-wrongdoer. The delivery of our statement of defence to the Defendant *Walter Butler* is sufficient notice under the *Judicature Act*, 1873, s. 24, sub-s. 3, and Rules of Court, 1875, Order XVI., rule 17, of our claim against him to entitle us to the inquiry: *Furness* v. *Booth* (4); *Bagot* v. *Easton* (5).

W. W. Cooper (Sir *H. Jackson*, Q.C., with him), for the Defendant *Walter Butler*, opposed the application :—

The Defendant *John Butler* is not entitled to ask for such an inquiry at the hearing on further consideration. *Walter Butler* has not "been duly served with notice in writing of the claim" under *Judicature Act*, 1873, s. 24, sub-s. 3. Moreover, such an order will not be made if the Plaintiff objects that the issue cannot conveniently be tried: *Marner* v. *Bright* (6). In that case and in *Bagot* v. *Easton* everything was done in regular form: notice had previously been given, and the proper order was made before the action came on to be tried.

Hemming, Q.C., and *H. A. Smith*, for the Defendant *Huntley*.

BACON, V.C. :—

This is a totally new practice, and we must be cautious in what

(1) 33 Beav. 513.
(2) Page 744.
(3) 4th Ed. p. 464.
(4) 4 Ch. D. 586.
(5) 11 Ch. D. 392.
(6) Ibid. 394, n.

we do. The first thing to be kept in view is that the Plaintiffs are entitled to their decree, wholly irrespective of any question that may exist between the two Defendants. Then it must be admitted that the Act of Parliament does provide in plain terms for the case where there is a question between two Defendants in which the Plaintiffs are not interested, and the only requisite which the Act prescribes is, that notice that the person claims to have such an inquiry should be given. Then it is decided that the statement of that claim in a pleading served upon the Defendant is sufficient notice, and the statute has been complied with. It has been argued that this notice has not been given in due form, and that in *Marner* v. *Bright* (1) and *Bagot* v. *Easton* (2) there had been orders made on previous application. That is quite true, but there is no kind of resemblance between *Bagot* v. *Easton* and this case. In *Bagot* v. *Easton* the man who had been made a Defendant said that he had nothing to do with the matter as against the Plaintiff, but that he, like the Plaintiff, had a claim against the Defendant, and, taking up an independent position, had as good a right to relief against him as the original Plaintiff. The result of which was, that there were in effect two Plaintiffs in the suit, and not one. In that state the case came on to be heard, but there is no kind of resemblance between that case and the present. Nor have I heard any objection to the application, except only that it is said that it has not been done in due form. Now I have disposed of that. The Master of the Rolls has decided that the notice contained in the pleading, that pleading being served on the party affected by it, is due notice to him. Is it any objection that the application was not made when the case was at the hearing? I think not, because both the Defendants were then combining to defeat the Plaintiff's claim. If they had succeeded, no such inquiry could have been necessary. If they had suggested as a sort of alternative, Suppose the case should go against us, or either of us, then one or the other is entitled to an inquiry; that would have been a dangerous admission, because the Plaintiffs would have availed themselves of that very readily and called it an admission, as it would very likely have been. The policy of the law and the plain enactment of the statute is, that if there be

(1) 11 Ch. D. 394, n. (2) 11 Ch. D. 392.

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questions such as are raised here, between the Defendants, then, before the Court parts with the case in which these questions are raised, it shall do justice between the parties. I have heard no reason why the inquiry should not be made, and I do not think that any forms in practice stand in the way of my now directing the inquiry, not deciding anything about it except that there should be an inquiry. Two persons are jointly and severally liable to a third, and the third establishes a claim against them. As a matter of course, the other two are entitled to have whatever question may exist between them decided. The proceedings before Mr. Justice *Fry*, as I understand, and in the Court of Appeal, only resulted in this—that there was no case yet to be dealt with. I have but an imperfect knowledge of what was done on that occasion, but there was nothing that Mr. Justice *Fry* or the Court of Appeal could found an order between the Defendants upon. To make a wide declaration that one or other was liable if certain circumstances happened, would be such a decree as the Court never makes and never would make. I do not know how the Defendant *Walter Butler* would be bettered, or more protected, if I put the Defendant *John Butler* now to give him a notice in the very same words as those contained in his statement of defence, of which the co-Defendant has had notice. That would be an idle proceeding. It is not disputed that he has notice of it, and I think it cannot be disputed that he has no ground for resisting the inquiry. I must take care not to have the decree, as far as the Plaintiff is concerned, incumbered by it.

MINUTE OF DECREE:—Decree for payment to the Plaintiffs by the Defendants within one month of the amount found due for principal, interest, and costs, with a declaration that on payment to the Plaintiffs according to the judgment of what is found to be due to them for principal, interest, and costs, all further proceedings to be stayed so far as the Plaintiffs and the Defendant *Huntley* are concerned. Inquiry how and in what proportions as between the Defendants *John* and *Walter Butler* the sums ordered to be paid to the Plaintiffs for principal, interest, and costs respectively should be borne and paid. Adjourn further consideration and costs.

Solicitors: *Saffery & Huntley; John Butler*, Defendant, in person; *Walter Butler*, Defendant, in person; *Kisbey*.

In re BRITISH GUARDIAN LIFE ASSURANCE COMPANY.

V.-C. H.
1880
March 6, 15.

Winding-up of Company—Summons under Companies Act, 1862, *s.* 165, *against Directors allowed; against Executors of a Director, dismissed, with Costs—Resolution of Company to invest Moiety of Premiums—Form of Policy—Directors, Representations and Breach of Trust by—Summons by Liquidator and Policy Holder jointly—Liability of Directors.*

The executors of a director, deceased, not being officials of a company, cannot be proceeded against by summons taken out under the provisions of the 165th section of the *Companies Act*, 1862.

Feltom's Executors' Case (1) followed.

A company in 1872 passed a resolution that for the better security of the policy holders 50 per cent. of the premiums paid on whole life policies should be invested in Government securities in the names of trustees, and representations were made by the directors of the manner in which the investments were made; but in the winding-up of the company it was discovered that premiums had been received and investments had not been made, as represented; and that the investments of premiums which had been made had been sold out, and the proceeds applied towards the general purposes of the company.

On summons by the liquidator and a whole life policy holder jointly, under the *Companies Act*, 1862, s. 165, for a declaration that the directors were liable to account to the company for a moiety of the premiums received:—

Held, that the summons was maintainable as against the surviving directors; that the directors were liable, as for a breach of trust, for a moiety of the premiums which ought to have been invested; and that the policy holder was a creditor of the company and rightly joined with the liquidator in the summons.

ADJOURNED SUMMONS.

The *British Guardian Life Assurance Company, Limited*, was, on the 3rd of June, 1876, ordered to be wound up. The company was formed in 1869, and was registered under the *Companies Act* in 1871. In 1872 a resolution "that for the better security of the policy holders 50 per cent. of the premiums paid on whole life policies on and after September 29, 1872, shall be invested in British Government securities in the names of the trustees of the company" was passed. Prospectuses were issued thereafter stating that "50 per cent. of the premiums paid upon whole life

(1) Law Rep. 1 Eq. 219.

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policies is invested in the names of trustees in British Government securities, for which purpose there is a quarterly audit of the income account, when the board hand to the trustees one half of the life assurance premiums. The amount is remitted to the brokers, who invest the money, sending to the trustees the *Bank of England* certificate. The account is kept in a ledger specially designed for this system, and is so arranged that any policy holder can at a glance see his position in the company." The forms of the policies issued by the company in pursuance of the above resolution contained, *inter alia*, the following provisions:—Clause 5: "Provided always and notwithstanding anything to the contrary herein contained, and notwithstanding the provisions of the *Statute for the Regulation of Joint Stock Companies*, it is hereby declared and agreed that the funds or property of the said company for the time being shall alone be liable in respect of or answerable to any demands under these presents, and that neither the persons whose names are hereunto subscribed, nor any director or other member of the said company, shall upon any account or pretence whatsoever be subject or liable to any action or other proceeding against him or her, or any execution against his or her lands, goods, or person in respect of these presents, or by reason of any judgment against the said company, it being a fundamental principle of the said company that no shareholder shall be liable beyond the amount of his or her share or interest in the capital, stock, or funds of the said company." And clause 8: "Provided also that in case the said persons whose lives are hereby assured shall commit suicide, or shall die by duelling, this policy shall be cancelled by the return of the premiums invested in Government security—viz., £50 per cent.—unless this policy shall have been duly assigned for valuable consideration, in which event the moneys assured thereby and assigned as aforesaid shall be paid to the assignee of this policy to the extent of such consideration so far as the same shall be not otherwise secured."

The directors appointed trustees for the purpose of the investments. In the proceedings in the liquidation it was discovered that after the 6th of August, 1875, no investment was made by the trustees, and that the sums which had before that time been invested were gradually sold out, and the proceeds applied to the

general purposes of the company before the company went into liquidation. The sum which the liquidator deposed ought to have been invested at the date of the winding-up order was £3012 5*s.* 11*d.* There was nothing available for the policy holders.

This was a summons by the liquidator and Mr. *E. Betts*, a whole life policy holder, under the 165th section of the *Companies Act*, 1862, against twenty-seven directors and the executors of two other directors (deceased), for a declaration that each of the directors was jointly and severally liable to account to the company to the extent of one half of the premiums on policies issued, received by the company or by the directors during the periods when they were such directors, paid under such policies; and for a declaration that the persons named in the schedule thereto, being the directors or the legal personal representatives of such of them as were dead, were liable to pay to the liquidator the sums set opposite their names, being the moieties of the said premiums received by the company, or by them respectively, during the time they were directors, with interest at 5 per cent. from the date of the above order.

The summons was adjourned into Court to be heard as against *J. W. Williamson*, who had been a director through the whole period of the transactions complained of and down to the date of the winding-up order, and who had frequently acted as chairman; and the executors of *Vincent Cornwell*, who was a director, but who died in January, 1879.

Hastings, Q.C. (*Seward Brice* with him), having stated the purport of the summons,

Romer (*Beddall* with him), for the executors of *Vincent Cornwell*:—

We object to the summons being heard as against them. The language of the 165th section is: "Where in the course of the winding-up . . . it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been

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guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor . . . notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained," with interest. It is clear that a summary application under the section can only be made against officers of the company; and the Court has no jurisdiction to decide any question against the executors of a deceased officer. *Feltom's Executors' Case* (1) is in point. It came before Vice-Chancellor *Kindersley* in 1865, in the voluntary winding-up of the *East of England Bank*, and it was held that the power which the section confers on the Court does not apply as against the executors of a deceased director. From that time to the present that decision has not been disputed, and for the very good reason that the executors of a deceased director are not officers themselves of the company, and therefore not within the purview of the section. If the estate of a deceased director is to be made liable it should be done in the ordinary manner. That decision was approved of by Lord Justice *Selwyn* in *Ex parte Hawkins* (2); and we ask the Court to hold that the liquidator has no right to proceed in this summary way against executors of a deceased director.

Northmore Lawrence, for *J. W. Williamson*, one of the surviving directors:—

I adopt the argument urged for the executors, and submit further that where a class of directors or other officers may be liable, one or more of whom are dead, the liquidator cannot proceed in this summary way against the surviving directors. This point was expressly left open by Vice-Chancellor *Kindersley* when he decided the question in *Feltom's Executors' Case;* and considering the decision in *Carpenter's Executors' Case* (3), though that case was under the *Winding-up Act* of 1848 (and the language of the section applicable was slightly different), the Court should dismiss this summons, the object of the statute being that all

(1) Law Rep. 1 Eq. 219. (2) Law Rep. 3 Ch. 787–791.
(3) 5 De G. & Sm. 402.

parties alleged to be liable, and not some of them only, shall be before the Court, in order that complete justice can be done between them all in one litigation, in which every question of inquiry and account can be properly disposed of, and that is the practice where trustees are sued for breach of trust: *Lewin* on Trusts (1).

Hastings, Q.C., and *Seward Brice*, for the summons:—

As to the objection taken for the executors, it may be said that *Feltom's Executors' Case* (2) was decided when the scope of the 165th section was not fully understood. The power of the Court is very considerable, and can be exercised as now asked: *Stringer's Case* (3). The question should be tried as if it were before the Court for the first time. It may be that Vice-Chancellor *Kindersley* would not allow *Feltom's* executors to be made liable under the section, as for a tort, but the application now is to make these executors responsible for a breach of trust; and no matter how complicated the case may be it can be inquired into under this section. There is nothing in the language to narrow the jurisdiction of the Court. The facts however are very different. *Feltom* died in 1863, and the order for winding up the bank was made in 1865, while *Cornwell* died in 1879, the winding-up order having been made in 1876. But the Master of the Rolls, on the 17th of November, 1877, on an application made in *In re National Funds Assurance Company* by the liquidator and two persons interested in the company, against eighteen directors, including two executors of a deceased director, made an order against six of them, named in a schedule, to pay the sums mentioned, and against all, including the executors, to pay the costs of the application. The importance of that order is that the Master of the Rolls did not object to deal with the case under the 165th section. It is submitted that the Court has jurisdiction, but if the objection should be held to be good the liquidator ought to be allowed to issue a writ, and the costs of the executors on this summons should be reserved and dealt with in the action.

As to the other objection, there is no foundation for it. The

(1) 6th Ed. ch. 31, sect. 2, p. 799. (2) Law Rep. 1 Eq. 219.
(3) Law Rep. 4 Ch. 475.

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Winding-up Act of 1848 was framed upon different principles, and has nothing to do with this application, while the *Companies Act*, 1862, enables the Court to deal with every case of this kind, and to do what may be necessary for the purpose of winding up the affairs of the company. *Carpenter's Executors' Case* (1) has no application.

The further argument was stopped by the Court, and

Northmore Lawrence, in reply, pointed out that in *Stringer's Case* (2) Vice-Chancellor *Malins* held that a bill ought to be filed by the liquidator.

HALL, V.C.:—

First, as to the objection taken that the 165th section is not capable of being put in operation against the executors of a deceased director. It has been contended that the question was expressly decided by Vice-Chancellor *Kindersley* in *Feltom's Executors' Case* (3), and that the decision was recognised by Lord Justice *Selwyn* in *Ex parte Hawkins* (4), and I think that the express point was decided, and upon the literal words of the 165th section. Looking at the language of the section in reference to making an offender who is criminally responsible liable, it appears to me that there is a total absence of power to investigate the conduct of a dead man under it, therefore I am of opinion that the words are in favour of the construction put upon them by Vice-Chancellor *Kindersley*. It has been contended that, having regard to the later decision in *Stringer's Case*, upon the 165th section, the decision in *Feltom's Executors' Case* is no longer binding, and that the Court can now take a more enlarged view, and apply the section to the case of a dead director. A good deal could perhaps be said in favour of the view, that notwithstanding the particular words of the 165th section, upon the whole of the statute a larger construction might be adopted in reference to the point which has been discussed, but no case has been referred to in

(1) 5 De G. & Sm. 402.
(2) Law Rep. 4 Ch. 475.
(3) Law Rep. 1 Eq. 219.
(4) Ibid. 3 Ch. 787.

which the question has been considered and adjudicated upon, for I cannot say that the case before the Master of the Rolls in 1877 is sufficiently in point for me to follow, looking at the form of the order made. I cannot hold that the executors of a deceased director are persons who can be made liable under the 165th section. Therefore the summons as regards them fails, and they are entitled to their costs, but I shall order them not to be paid at present, because other proceedings may be taken to raise the question of their liability.

As regards the other objection, that there cannot be, as there ought to be, a complete litigation, I hold that it is one which cannot be maintained. There is nothing in the section which points to the necessity of having every person concerned—those who are alleged to be liable and those who are liable—here. The summons may be taken out against any one of the persons referred to. If this objection were allowed it would in some cases render the section inoperative. If a person, for instance one out of thirty, could be allowed to say you must have all here, it would bring the section to a dead lock. But I consider that everybody is now before me in this case except the executors of the deceased director.

Carpenter's Executors' Case (1) arose under a different statute, differently framed, and when examined it will be found to be inapplicable to the present case. An observation was made in reference to *Stringer's Case* (2), that all objections are open to the parties as in a suit. That however means as to defence upon the merits and not in regard to parties. The point in that case was that the persons sought to be charged could have been brought before the Court by bill filed against them, and that was true, but no injustice would be done by this case being heard under the 165th section. There is here no question about parties, and the case can be disposed of upon its merits. It was, no doubt, the practice once that where trustees were sued all were brought before the Court to make them all liable, but that has not been the practice for a considerable period. There are cases in which the Court has allowed some to be sued without suing others, and I do not see why that practice should not be applied to a case of

(1) 5 De G. & Sm. 402. (2) Law Rep. 4 Ch. 475.

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this kind. The summons against the surviving directors must be proceeded with.

March 13, 15. The summons was now heard on the merits.

Hastings, Q.C., and *Seward Brice*, for the liquidator and Mr. *Betts*, after reading the evidence shewing the course which the directors took subsequently to the passing of the above resolution of 1872, and the issuing of the prospectuses, submitted that as to the questions of law it was practically an undefended case. The directors were from 1872 liable as for a breach of trust, and also liable to make good the representations which they had made by the issuing of the printed documents, shewing the mode in which the funds received would be dealt with by the company. The case of *In re National Funds Assurance Company*, heard before the Master of the Rolls in November, 1877, was identical with this. The application there was by the liquidator and two others against eighteen directors of that company, asking that they might be ordered to pay to the liquidator or into Court the sum mentioned, being 50 per cent. of the amount received by them in respect of premiums for policies of insurance which by the articles of association should have been invested by them as therein directed, and also interest on the same sum from the respective times of the receipt of the same until payment; and the order made, after hearing counsel for the applicants and for some of the directors, was that each of the directors was jointly and severally liable to the extent of half the premiums received by them respectively during the respective periods when they were such directors, after making certain deductions for death claims and surrenders; and that the persons named in the schedule thereto, being six of the directors, do on or before the 17th of December, 1877, pay into Court the sums mentioned. The directors there were held to be jointly and severally responsible for 50 per cent. of the premiums received, which ought to have been invested: that is to say, each of the six named was liable for the aggregate sum, although it was not actually received by any one; therefore we ask that Mr. *Williamson*, who was a director, shall be made liable for 50 per cent. of the premiums received after September,

1872, upon the whole life policies, but subject to like deductions, and we ask for a declaration against him for payment of the sum mentioned in the summons, with interest, in the same form as in *In re National Funds Assurance Company*, 1877.

[They referred to *Moore and De la Torre's Case* (1), *In re National Funds Assurance Company* (2) (a former hearing in the same winding-up as that above mentioned), and *Waterhouse* v. *Jamieson* (3).]

Northmore Lawrence, for Mr. *Williamson*:—

I submit that Mr. *Betts* has no right to apply by summons under the 165th section, but must enforce any right which he may have in an action. There has been no misfeasance, or breach of trust as against a creditor or other person, but, if any, it was in respect of "moneys of the company." It may be said that a policy-holder is a creditor, but that is not meant by the section. If the liquidator did not take proceedings then, perhaps, a creditor might. It is not pretended that *Williamson* misapplied the moneys which came to his hands; therefore the application must be considered as one for "breach of trust in relation to the company." The policy-holder has no right to apply under the 165th section on the ground that *Williamson* has been guilty of a breach of trust in respect of the 50 per cent. of the premiums. Even as *quâ* creditor he cannot come to enforce a right better than the company have. If there be a particular class who claim a right under a contract, they must enforce it in an action. No case has been made on behalf of the policy-holder, and therefore the charge of representation fails. There was no contract between the company and the policy-holder. The only contract was in the policy itself, and there is an express provision (clause 5) "that the funds . . . of the said company . . . shall alone be liable." The contract in clause 8 does not arise here. Mr. *Betts* agreed that no director should be subject or liable to any action or other proceeding. The resolution of September, 1872, is too vague to found any claim upon. The moneys were to be invested in the names of trustees. There is no provision as to how the funds shall be

(1) Law Rep. 18 Eq. 661. (2) 10 Ch. D. 118.
(3) Law Rep. 2 H. L., Sc. 29, 32.

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applied or what shall become of the 50 per cent. Nothing is said as to who are to have the benefit of the trust, or how long the funds are to remain invested. There is nothing to prevent the funds being applied to any other *bonâ fide* purpose of the company. The liquidator admits that the funds have been applied to the general purposes of the company. Notwithstanding the resolution of 1872 the funds still remained the assets of the company, and no policy-holder (no special right being created in him) could have asked for an injunction against the directors to prevent them from applying them towards the general purposes of the company: *In re Stuart's Trusts* (1).

As to the liquidator, he complains that *Williamson* was guilty of a breach of trust or of misfeasance in not investing 50 per cent. of the premiums; but as the funds remained general assets, and he admits they were applied towards the general purposes of the company, his case fails too. A proper amount was invested up to a certain time, and then sales of investments commenced, and the proceeds applied for the benefit of the company in discharge of debts; and if the course pursued was improper those directors only should be made liable who concurred in those acts: *Land Credit Company of Ireland* v. *Lord Fermoy* (2); *Joint Stock Discount Company* v. *Brown* (3); *Gray* v. *Lewis* (4).

There is no evidence that Mr. *Williamson* was a party to any misfeasance or breach of trust, and in the absence of it he cannot be made liable. The order made by the Master of the Rolls on the 17th of November, 1877, in *In re National Funds Assurance Company*, was only against six of the directors, probably those who concurred in a breach of trust, but there are no facts before the Court to shew how that case stood. In that case, however, certain deductions were allowed; and no interest was allowed, though it was asked for by the liquidator. Even if Mr. *Williamson* should be held liable, as this is a representative case, he ought to have his costs of the hearing in Court out of the funds.

Hastings, in reply:—

I submit that a policy-holder is a creditor, and therefore

(1) 4 Ch. D. 213.
(2) Law Rep. 5 Ch. 763.
(3) Law Rep. 8 Eq. 381, 401.
(4) Ibid. 526, 545.

entitled to come by summons under the 165th section. The point was considered by the Master of the Rolls in *In re National Funds Assurance Company* (1). A clear breach of trust has been proved against the directors, their duty being, under the resolution, to invest 50 per cent. of the premiums, and Mr. *Betts* alone has a right, as a creditor, to make them responsible. A policy-holder can bring an action against the directors: *Kearns* v. *Leaf* (2). The question in *In re Stuart's Trusts* (3) has nothing whatever to do with the present; nor have the other three cases which have been referred to.

HALL, V.C.:—

This case has been argued by Mr. *Northmore Lawrence* with very great ingenuity and ability, but I must, notwithstanding the argument which he has addressed to me, hold that Mr. *Willamson* is liable as a director of the company, both as regards the selling out of the investments which were actually made, and the moneys which ought to have been invested by the directors—both liabilities must, however, be subject to deductions for death payments and surrenders. They will be ascertained in taking the accounts. As to the objections urged against the form of summons: first, as to a policy-holder having no *locus standi*, as not being a person who can apply under the 165th section. It appears to me upon the construction of the section that inasmuch as an application may be made by any creditor, and as Mr. *Betts* is a creditor, there is no reason why I should exclude his case from the operation of the section. Whether it is a breach of trust or misfeasance, the liability or accountability of the directors must be "in relation to the company," and the case made on behalf of the liquidator is one of liability and accountability and misfeasance or breach of trust in relation to the company. It seems to me that the application is within the terms of the section, and that there can be no valid objection to it in respect of its being made by a whole life policy-holder, as well as by the liquidator. It is not uncommon in proceedings in this Court, when a

(1) 10 Ch. D. 124. (2) 1 H. & M. 681.
(3) 4 Ch. D. 213.

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difficulty is raised, for a policy-holder to be joined in the summons, to enable the Court to get over the difficulty at once, but in this case that is not necessary, because Mr. *Betts* has been made a party, and was properly joined in the first instance. In the case of *In re National Funds Assurance Company* (1), the Master of the Rolls, to avoid any possibility of question, directed that the summons taken out by the liquidator should be amended by adding the name of a creditor. Next it was contended that the directors are not liable, because clause 5 in the policy provides that the funds of the company shall alone be liable, and that the persons whose names were subscribed shall not be liable to any action or other proceedings. The contention was that the clause protects the director against what is alleged in this case, a breach of trust in the discharge of his duty as director; but the clause has no application or reference to any such case. It has reference only to a shareholder's liability, and it is limited to the amount of his share or interest in the capital stock or fund. The next point argued was: granted the resolution of 1872 is part of the constitution of the company, that for the better security of the policy-holders 50 per cent. of the premiums should be invested, it is unintelligible and cannot be construed and applied, and is, therefore, so entirely illusory that it must be considered as being inoperative. I cannot say that there might not be questions raised as to the application of the funds which were to be invested in the manner specified, but as regards the investment a clearer clause than this I never saw, and I see no difficulty in construing the words, viz., that 50 per cent. of the premiums on the whole life-policies shall be invested in Government securities. The addition of the words "for the better security of the policy-holders," does not create an ambiguity which reduces the clause to a nullity. As to any question that may have to be decided between the policy-holders and the whole life policy-holders, because the amount to be invested is 50 per cent. of the premiums paid on the latter, I abstain from expressing any opinion. Should there be any question as to the application of the funds, there can be none either as to the amount to be set apart and invested, or that the clause created an obligation on the part of those who had the

(1) 10 Ch. D. 124.

management of the company to see that effect was given to it. It was submitted that the funds had been properly applied for purposes of the company. As to that, there is no ambiguity or vagueness in the clause, and I have not the least doubt that it was meant as a protection to those entitled under the trust as policy-holders, and that there would have been no difficulty whatever, if the persons entitled to the benefit of the funds had taken proceedings for the purpose of preventing them being applied towards the general purposes of the company. I now come to the question of Mr. *Williamson's* liability—whether or not he is under any, and I hold that he having been a director during the whole of the time in which investments ought to have been made—having been a most active member of the board, constantly attending, and rarely absent from the meetings of the directors, is, in common with his co-directors, liable. It was his duty to see that the investments were made in accordance with the resolution and clauses of the partnership contract, and his not attending to it was a breach of trust to the company for which he was acting as a director; a breach of trust in respect of which, after the order made for winding up the company, he can be charged and made liable.

It has been observed that the liquidator has rights under the Act which the company might not have against the directors; but however that may be, Mr. *Williamson's* liability is clear as a director, and he has not brought forward any ground for being relieved wholly or partially in respect of any particular dealing with any sum. He has not shewn that he was not a participator in the non-investments of the funds, and the *onus*, I consider, rests with him. Though I hold him liable, subject to the deductions already mentioned, I do not think that he ought to be charged with any interest upon the sums which are not available for the purposes of the company by reason of his acts or omissions. As to the costs of the adjourned summons, I shall not finally dispose of Mr. *Williamson's* now. I shall not make him pay costs, and as to being allowed his own, I shall give him liberty to apply in Chambers, and the allowance of them will depend upon whether this order will have the effect of settling the claims against the other directors.

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Declare, that Mr. *Williamson* is liable to account to the liquidator to the extent of one half of the premiums received between the years 1872 and 1876, after allowing such sums as are properly payable, or have been paid, out of the funds invested, or which ought to have been invested.

Solicitors: *Bolton, Robbins, & Busk; Mercer & Mercer; Vallance & Vallance.*

V.-C. H. 1880 *March* 22.

CLARKSON *v.* HENDERSON.

Mortgage of Reversionary Interests—Covenant for Compound Interest—Interest Capitalized—3 & 4 Will. 4, c. 27, s. 42—Six Years' Interest.

A. and *B.*, reversioners after a life interest in *C.*, mortgaged their property and covenanted that interest in arrear should be capitalized, and bear interest after the same rate; and *C.* also assigned her life interest as part of the security:—

Held, that the covenant was good and valid; and that the mortgagee was not limited to six years' interest.

Adjourned Summons.

James and *George P. Henderson* being entitled under the will of *John Henderson* to certain interests in funds in Court in reversion expectant on the death or marriage again of *Sarah Henderson*, by deed dated the 13th of March, 1865, assigned such interests, and *Sarah Henderson* assigned the income of such funds to *Thomas Cox* subject to a proviso for redemption on payment of £872, with interest at £6 per cent. The deed contained a proviso and a joint and several covenant by *James* and *George P. Henderson* that all the interest which should during the continuance of the security accrue due on the £872, and all interest which should accrue due on that interest or upon any other interest which should be capitalized under that clause, should, in case the same should not be paid within twenty-one days from the respective times of the same becoming due, become principal and be added to the principal sum of £872 as or in the nature of a further advance, and should carry interest at £6 per cent., to be computed from the respective times of such interest accruing due, and such interest should be

considered to accrue and should be payable from time to time on the days thereinbefore appointed for the payment of interest on the original sum of £872: so that by the addition and capitalization of the interest as aforesaid the total principal money thereby secured might be augmented upon the footing of an accumulation at compound interest computed at the rate of £6 per cent. with rests taken or made half-yearly on the days therein mentioned: and that all additions to the principal sum of £872 by means of capitalized interest should be charged on the mortgaged premises, and should to all intents and purposes be within the scope and operation of the security, but so that the proviso should not be deemed to authorize the mortgagors to allow any interest to fall into arrear unless permitted so to do by the mortgagee: and that the mortgagors would after the same should be due upon demand pay to the mortgagee any interest which should be capitalized thereunder, and any interest which should accrue thereon. And it was also provided that the mortgagee should forbear requiring or obtaining payment of any principal or interest until the 13th day of March, 1868, if the mortgagors should both so long live, except so far as the mortgagee might in the meantime be able to obtain any money in or towards satisfaction of his debt by the perception or receipt of any of the property assigned then or at any time thereafter capable of being reduced into possession. Part of the mortgaged property having become distributable, a petition was presented for payment, and thereupon an inquiry was directed to ascertain the amount due on the mortgage. A question arose in Chambers whether the mortgagee was entitled to capitalize interest under the provisions of the deed, the contention on his part being that the sum of £1628 16*s.* 9*d.* was due for principal moneys, including capitalized interest. The matter was adjourned into Court.

C. H. Turner, for the mortgagors:—

The account made out shews that compound interest has been calculated for a period of fourteen years, and it is submitted that the mortgagee is not entitled to more than six years' simple interest. It is against the policy of the law for a mortgagor to enter into such a covenant as the one set forth in the mortgage

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deed. It was so before the abolition of the usury laws: *Ex parte Bevan* (1), *Chambers* v. *Goldwin* (2); and the repeal of those laws has made no difference in that respect: *Parker* v. *Butcher* (3).

Hastings, Q.C. (*Everitt* with him), for the mortgagees:—

The decision in *Parker* v. *Butcher* has been virtually overruled by Vice-Chancellor *Bacon* in *Provident Permanent Building Society* v. *Greenhill* (4).

HALL, V.C.:—The terms of the contract there are different from those in the case of *Parker* v. *Butcher*.

C. H. Turner:—I contend that compound interest is a collateral advantage which is not allowed by the Chancery Division of the High Court.

Hastings, Q.C., and *Everitt*, were not called upon.

HALL, V.C.:—

I hold that the security given by the mortgagors for compound interest is good; and the amount due to the mortgagee must be ascertained and certified by the Chief Clerk upon the footing that the provisions of the deed are good and valid, and must be acted upon. I also hold that the case is not within the 3 & 4 Will. 4, c. 27, s. 42, that is, that the mortgagee is not limited to six years' interest.

Solicitors: *Smith & Foster*; *W. Foster*.

(1) 9 Ves. 223.
(2) Ibid. 254, 271.
(3) Law Rep. 3 Eq. 762, 767.
(4) 9 Ch. D. 122.

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[1879 R. 56.]

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Feb. 20, 21, 23.

Agreement in Restraint of Trade—Validity—Limitation as to Space—Reasonableness—Foreign Judgment—Enforcing by English Court.

There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space.

The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space.

Allsopp v. *Wheatcroft* (1) disapproved.

Leather Cloth Company v. *Lorsont* (2) followed.

If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English Court will not enforce it.

The policy of the English law in favour of trade applies to foreigners trading in *England* equally with English subjects.

The principles on which the Court acts in enforcing judgments of a foreign Court discussed.

The Defendant, a Swiss subject, entered into an agreement with the Plaintiffs, French subjects residing in *France*, when he was in *France* on a temporary visit, he being then domiciled in *Switzerland* but residing in *England*. The Plaintiffs afterwards obtained judgment against him in a French Court for breach of the agreement. He was not in *France* at the commencement of or at any time during the action, and he had no notice of the proceedings, though the Plaintiffs knew his address in *England*, where he was then still residing:—

Held, that the judgment could not be enforced by an English Court.

Schibsby v. *Westenholz* (3) considered.

THIS action was brought to restrain the Defendant from violating an agreement in restraint of trade, and to enforce a judgment which the Plaintiffs had obtained in *France* on the agreement.

The Plaintiffs, *Jean Rousillon* and *Gustave Rousillon*, carried on business in partnership as champagne merchants, at *Epernay* in *France*. They had also an office in *London*. They were not the proprietors of any vineyard, but they were in the habit of either

(1) Law Rep. 15 Eq. 59. (2) Law Rep. 9 Eq. 345.
(3) Law Rep. 6 Q. B. 155.

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buying grapes from the owners of vineyards in *Champagne* and then manufacturing and bottling the wine, or buying the wine from the owners of the vineyards and then bottling it. They exported the wine to *England* and other countries.

The Defendant, *Auguste Rousillon*, was a nephew of the Plaintiff *Jean Rousillon*. He was a native of *Switzerland*. In 1866 the Plaintiffs took him into their employment as a clerk, with a view to his learning their business, and they afterwards sent him to *England* at their expense that he might learn English.

In November, 1867, he commenced travelling for the Plaintiffs in *England* and *Scotland*, and was occasionally also sent by them to *Holland*. He continued in this employment until October, 1869. On the 9th of October, 1869, the Defendant was at *Epernay* on a short visit on his way back to *England*, after spending his holiday with his friends in *Switzerland*. On the 9th of October, 1869, the Defendant wrote a letter in the French language, addressed to the Plaintiff *Jean Rousillon*, of which the following is a translation:—

"As a return for the kindness and care of which I have been the object, and the trouble you have taken in my commercial education, I address this letter to you, as a proof that I undertake not to represent any other champagne house for two years after having left you, if at any time I leave your house for any reason whatever, whether it be on your part or on my own. I also undertake not to establish myself, nor to associate myself with other persons or houses, in the champagne trade (*dans le commerce des champagnes*) for ten years, in case I should leave you as already mentioned above.

"I enter into these engagements trusting to your assurance that I may rest in the idea that my position is assured in your house, except in the event of unforeseen events or of negligence on my part in your affairs, which are or shall be entrusted to me, and I promise to do all in my power to maintain and increase the good reputation of your house in the countries I am connected with."

At the time when this letter was written the Defendant was domiciled in *Switzerland*, but his place of residence was in *England*. Soon after the letter was written the Defendant returned to

England, and resumed his employment for the Plaintiffs; and he continued in their employment as a traveller in *England* and *Scotland* until the 1st of March, 1877, when they gave up their retail trade, and no longer required his services.

In May, 1878, the Defendant started in business as a retail wine merchant in *London*, selling champagne and other wines. In his advertisements and circulars he described himself as of "*Ay, Champagne*," and he placed a similar brand on the corks of the bottles of champagne wine which he sold. He had in fact no establishment at *Ay*, or elsewhere in *Champagne*, but he imported the champagne wine which he sold from growers in *Champagne*. The Plaintiffs alleged that the Defendant was in this way violating the engagement which he had entered into by the letter of the 9th of October, 1869, and in September, 1878, they instituted an action against him in the Tribunal of Commerce at *Epernay*. On the 6th of November, 1878, they obtained a judgment against him, which (*inter alia*) condemned him to pay 15,000 francs in compensation for the damage done to that day to the Plaintiffs, and also to pay costs. The Defendant was in *England* during the proceedings in this action, and he had in fact no notice of the action until after the judgment had been obtained. By the French law, when an action is brought against an absent defendant, notice of the citation must be served upon an officer called the Procureur of the Republic. The practice is for the Procureur to send the summons to the Minister of Foreign Affairs, who forwards it to the French consulate in the country where the absent defendant is, and then notice is sent by the consulate to the address of the defendant in that country. The Plaintiffs served the summons in the action upon the Procureur accordingly. The summons stated the Defendant's address in *London*, but no notice of the proceedings was in fact received by the Defendant. Judgment went against him by default, and notice of the judgment was afterwards given to him, a notification of the judgment being transmitted to the French consulate in *London*, from which a notice was sent to the Defendant.

According to the evidence of a French *avocat*, given at the trial of the present action, such a judgment became void by French law if it was not executed within six months after its

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date, or if the Plaintiff in the action had not within that period used his utmost efforts to execute it. There was no evidence that the Plaintiffs had made any attempt to execute the French judgment against the Defendant. The *avocat* said that there was no mode, so far as he knew, by which a defendant could get such a judgment set aside by the French Court. He also said that there is no objection in French law to any agreement in restraint of trade.

The writ in the English action was issued on the 1st of March, 1879.

The Plaintiffs claimed an injunction to restrain the Defendant from carrying on the business of a champagne merchant for a period of ten years from the 1st of March, 1877; payment by the Defendant of the amount which he had been ordered to pay by the French judgment; and damages for the breach of the Defendant's agreement subsequently to the date of the French judgment.

By his statement of defence the Defendant denied that the agreement contained in the letter of the 9th of October, 1869, was binding on him, and said that there was no consideration on the part of the Plaintiffs for the agreement on his part. He alleged that the agreement was invalid, as being in restraint of trade, and that the French Court had no jurisdiction to entertain the proceedings against him, inasmuch as at the time of the proceedings he was domiciled in *England*, and had no residence in *France*, and did not owe and never had owed any allegiance to the laws of *France*. He also denied that he had committed any breach of the agreement.

Cookson, Q.C., and *S. Dickinson*, for the Plaintiffs:—

1. Though the Plaintiffs could have dismissed the Defendant from their service at any time, the consideration which they gave for the agreement on the part of the Defendant was adequate: *Davis* v. *Mason* (1); *Gravely* v. *Barnard* (2).

2. As the contract was entered into in *France* its validity must be determined according to French law, the *lex loci contractus*, and the evidence shews that covenants in restraint of trade are not

(1) 5 T. R. 118. (2) Law Rep. 18 Eq. 518.

invalid under French law, as they are to some extent under English law. A covenant in general restraint of trade would be perfectly valid under French law.

[FRY, J.:—The English law on this point is founded on public policy; it is not part of the law of contract. Would an English Court regard the French law if it went contrary to the policy of the English law?]

If a contract made in a foreign country were founded on a *turpis causa* an English Court would not enforce it, even if it were valid under the foreign law, but the English Court would not decline to enforce the contract merely because the policy of the law of the two countries differed. Moreover, the policy of the English law in this respect has regard only to the trading of Englishmen; it does not concern itself with the question whether foreigners are prevented from trading in *England: Quarrier* v. *Colston* (1); *Connor* v. *Earl of Bellamont* (2); *Story's* Conflict of Laws (3).

3. The agreement in the present case is valid according to English law. There is no absolute rule that a restraint of trade which extends to the whole kingdom is void. *Allsopp* v. *Wheatcroft* (4) is distinguishable. No doubt Vice-Chancellor *Wickens* said in that case (5), that "a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void." But that is inconsistent with the decision of Lord Justice *James*, when Vice-Chancellor, in *Leather Cloth Company* v. *Lorsont* (6), in which an agreement not to carry on a particular business in any part of *Europe* was enforced.

[FRY, J.:—The Vice-Chancellor evidently determined that case on a consideration of the reasonableness of the restraint under the particular circumstances, and not upon any rigid rule as to space. *Tallis* v. *Tallis* (7) and *Wallis* v. *Day* (8) seem to shew that the question is whether the restraint is a reasonable one.]

The cases on the subject are collected in *Smith's* Leading

(1) 1 Ph. 147.
(2) 2 Atk. 382.
(3) 7th Ed. § 242, *et seq.*
(4) Law Rep. 15 Eq. 59.
(5) Law Rep. 15 Eq. 64.
(6) Ibid. 9 Eq. 345.
(7) 1 E. & B. 391.
(8) 2 M. & W. 273.

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Cases (1), and they do not support the proposition there laid down that a covenant in restraint of trade must be partial.

[FRY, J.:—In *Master, &c., of Gunmakers* v. *Fell* (2), Chief Justice *Willes* said (3): "The general rule is, that all restraints of trade, which the law so much favours, if nothing more appear, are bad."]

The question of extent is really a question of reasonableness, and the reasonableness must vary with the facility of the means of communication. If a trade is carried on over a wide extent, either through a whole country or through a whole continent, there is nothing unreasonable in the restraint being equally extensive. Wine, and in particular champagne, is an article of cosmopolitan consumption, and the trade in it extends everywhere, at any rate over the whole of *Europe*. The Court will, therefore, grant an injunction to enforce the performance by the Defendant of his agreement.

4. The Court will give effect to the French judgment so far as it has ascertained the damages sustained by the Plaintiffs up to the time when it was pronounced. The original course of action is not merged in that judgment. A foreign judgment amounts merely to an agreement between the parties for ascertaining the amount of damages: *Smith* v. *Nicolls* (4). An English Court cannot examine into a foreign judgment: *Martin* v. *Nicolls* (5).

[FRY, J.:—Suppose the judgment had been obtained in a way which shocks all our English notions of justice?]

There may be an implied contract on the part of a man who enters into an agreement in a foreign country to be bound by the procedure of the Courts of that country. In the *Bank of Australasia* v. *Nias* (6), it was held that a defendant could be sued in this country upon a judgment recovered in the colony of *New South Wales* against the chairman of a banking company in which the defendant was a shareholder, an Act passed by the colonial legislature having provided that the company might be sued in the name of the chairman, and that execution on any judgment

(1) 8th Ed. vol. i. pp. 417–442.
(2) Willes, 384.
(3) Ibid. 388.
(4) 5 Bing. N. C. 208.
(5) 3 Sim. 458, 465.
(6) 16 Q. B. 717.

recovered in that way against the company might be issued against the property of any member of the company for the time being. The defendant pleaded that he had not been served with, or had any notice of any process in the colonial Court, and the plea was held bad. *Schibsby* v. *Westenholz* (1) no doubt shews that an English Court will not enforce a foreign judgment, obtained in default of appearance of the defendant, when the defendant was not, at the time when the suit commenced, a subject of nor resident in the foreign country, the contract having been made in *England*. If the contract had been entered into in the foreign country the result would probably have been different; for Mr. Justice *Blackburn*, who delivered the judgment of the Court, said (2): "If at the time when the obligation was contracted the Defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued."

[FRY, J.:—Does not Mr. Justice *Blackburn* refer there to a casual unexpected leaving of the foreign country by a person who was permanently resident there at the time when the contract was entered into?]

A man who enters into a contract in a foreign country must be taken to have contemplated the enforcement of the contract in that country.

[FRY, J.:—The place where the contract is to be performed is a very material circumstance. The contract now in question, though made in *France*, was evidently intended to be performed in *England*.]

It is a negative contract. It does not point to one *locus solutionis* once for all. In *Copin* v. *Adamson* (3) the Court thought it reasonable that a man who had contracted to become a member of a French company should be taken to have contracted to submit himself to the jurisdiction and the procedure of the French Courts.

[FRY, J.:—There the contract was to become a member of a

(1) Law Rep. 6 Q. B. 155. (2) Law Rep. 6 Q. B. 161.
(3) Law Rep. 9 Ex. 345.

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French company, the statutes of which provided that, if a shareholder did not elect a domicil, an election should be made for him of a domicil, at which process should be served on him. Here the contract is to do something in *England.*]

There is no written contract for service by the Defendant. The extent to which a foreign judgment is impeachable in this country is shewn by *Becquet* v. *MacCarthy* (1); *Reimers* v. *Druce* (2); *Story's* Conflict of Laws (3). The writ in this action was issued within the six months after the date of the French judgment.

[FRY, J.:—If the French judgment had been rescinded before the trial of this action, could this Court enforce it?]

It is enough that the Plaintiffs had a right to sue when the writ was issued. *Schibsby* v. *Westenholz* (4) shews that it is immaterial whether the Defendant knew of the French judgment or not; there was an obligation on him to pay the amount found due from him, provided that he had once submitted himself to the foreign jurisdiction: *Buchanan* v. *Rucker* (5); *Douglas* v. *Forrest* (6).

[FRY, J.:—The *ratio decidendi* in *Douglas* v. *Forrest*, as appears by what Chief Justice *Best* said (7), was that the Defendant owed allegiance to the country in which the judgment was given against him, from having been born in it, and that his property was protected by the laws of that country at the time when the judgment was given. That is not so in the present case.]

The Defendant owed allegiance to the laws of *France* by reason of his temporary residence there when the contract was entered into. That is sufficient. *Young* v. *Brassey* (8) is an instance of the practice of the English Courts as to service out of their jurisdiction.

North, Q.C., and *Dundas Gardiner*, for the Defendant:—

The evidence shews that the Plaintiffs took no steps to serve the Defendant with notice of the proceedings in the French Court,

(1) 2 B. & Ad. 951.
(2) 23 Beav. 145.
(3) 7th Ed. § 603 *et seq.*
(4) Law Rep. 6 Q. B. 155, 160.
(5) 9 East, 192.
(6) 4 Bing. 686.
(7) Ibid. 703.
(8) 1 Ch. D. 277.

though they knew his address in *England*. Such a course is contrary to natural justice.

1. A contract cannot be enforced in the Courts of this country if any part of it be contrary to public policy: *Hope* v. *Hope* (1); *Grell* v. *Levy* (2).

2. The agreement in question is totally opposed to the policy of the English law.

It might be contended that the consideration is inadequate, and that the cases as to guarantees, such as *Morrell* v. *Cowan* (3), do not apply. But *Gravely* v. *Barnard* (4) is against that contention, and we do not propose to raise it now.

Upon the construction of the agreement we say that it only prevents the Defendant from engaging in a business similar to that which the Plaintiffs carry on; it does not prevent him from engaging in trade as a retail wine merchant. If it does it is invalid, for it goes further than is necessary for the reasonable protection of the Plaintiffs. And, moreover, the authorities shew that a covenant in restraint of trade is bad if it be universal as to space, independently of the question of reasonableness. The law is so laid down in *Smith's* Leading Cases (5), and this was recognised as correct by the Privy Council in *Collins* v. *Locke* (6). There the Court said (7) that "agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable." If the Plaintiffs are right the Defendant could not, during the ten years, enter into partnership with any wine merchant in any part of the world who sells champagne, even if it were the Plaintiffs' own champagne. In *Allsopp* v. *Wheatcroft* (8) Vice-Chancellor *Wickens* took the same view of the law. *Leather Cloth Company* v. *Lorsont* (9) is distinguishable, for there the Defendant had sold a trade secret to the Plaintiffs, and had agreed not to make use of that which he had sold to them in any part of *Europe*. Other authorities on the subject are *Ward* v. *Byrne* (10);

(1) 8 D. M. & G. 731.
(2) 16 C. B. (N.S.) 73.
(3) 6 Ch. D. 166; 7 Ch. D. 151.
(4) Law Rep. 18 Eq. 518.
(5) 8th Ed. vol. i. p. 432.
(6) 4 App. Cas. 674.
(7) Ibid. 686.
(8) Law Rep. 15 Eq. 59.
(9) Ibid. 9 Eq. 345.
(10) 5 M. & W. 548.

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Hinde v. *Gray* (1); *Homer* v. *Ashford* (2); *Printing and Numerical, &c., Company* v. *Sampson* (3). The only case in which a covenant in restraint of trade, unlimited as to space, has been held good is *Wallis* v. *Day* (4).

[FRY, J., referred to *Jones* v. *Lees* (5); *Whittaker* v. *Howe* (6); *May* v. *O'Neill* (7).]

At any rate, it is clear from the authorities that such an agreement will not be enforced if it goes farther than is necessary for the reasonable protection of the Plaintiffs: *Kimberley* v. *Jennings* (8); *Smith's* Leading Cases (9). The restraint in the present case is utterly unreasonable.

3. The Court will not enforce a foreign judgment which is not a valid subsisting judgment at the time of the trial; it is not enough to shew that there was a good cause of action when the writ was issued. The evidence shews that this judgment is void according to French law if not executed within six months, or at any rate if everything possible is not done to execute it, and there is no evidence that any steps were taken to execute it within that time. Moreover, this kind of judgment by default is very unjust, for, as far as the evidence goes, it does not appear that the Defendant could ever have got it set aside after it had been pronounced. *Schibsby* v. *Westenholz* (10), *Godard* v. *Gray* (11), and *Copin* v. *Adamson* (12), are all authorities which shew that in the circumstances of the present case a foreign judgment will not be enforced by an English Court. The passage relied upon in the judgment of Mr. Justice *Blackburn* (13) does not even amount to a *dictum*, for he says that before finally deciding the question the Court would like to hear it argued. In *Copin* v. *Adamson* the *ratio decidendi* was that the shareholder had by the constitution of the company contracted to be bound by French law; not that he had done so by merely becoming a member of a French company. There was a special

(1) 1 Man. & G. 195.
(2) 3 Bing. 322.
(3) Law Rep. 19 Eq. 462.
(4) 2 M. & W. 273.
(5) 1 H. & N. 189.
(6) 3 Beav. 383.
(7) Pollock on Contracts, 2nd Ed. p. 315.
(8) 6 Sim. 340.
(9) 8th Ed. vol. i. pp. 437 *et seq.*
(10) Law Rep. 6 Q. B. 155.
(11) Ibid. 6 Q. B. 139.
(12) Ibid. 9 Ex. 345.
(13) Law Rep. 6 Q. B. 161.

contract. No doubt Chief Baron *Kelly* differed from the view of the other Judges.

In *Becquet* v. *MacCarthy* (1) the Defendant owned immoveable property in the colony, in respect of which property the action arose, and was a subject of the colony. The first of those circumstances occurred also in *Douglas* v. *Forrest* (2).

In the present case it cannot under the circumstances be said that the Defendant was under any legal obligation to obey the French judgment, and, if so, this Court will not enforce it: *Godard* v. *Gray* (3).

Cookson, in reply:—

It is not a valid objection to the enforcing of the agreement that it is in part illegal, for it is a severable or divisible agreement: *Price* v. *Green* (4). *Hope* v. *Hope* (5) and *Grell* v. *Levy* (6) are distinguishable. The ground of the decision in the latter case was that the claim was made by an attorney, an officer of the English Court, upon an agreement made abroad which was void by English law on the ground of champerty. *Collins* v. *Locke* (7) was decided on the ground that the extent of the restriction there imposed was "utterly unprofitable and unnecessary, at least for any purpose which could be avowed." There is no hard and fast rule as to the extent of such a restriction; the question in each case is whether the restriction is a reasonable one. Looking at the circumstances of the present case, the restriction imposed on the Defendant is not unreasonable. It is absurd to suppose that the Plaintiffs would wish to prevent the Defendant from selling their own champagne. But the use of the Defendant's own name, which is the same as that of the Plaintiffs', might open the door to fraud, or at any rate to mistake. It is a mistake to say that *England* was intended to be the *locus solutionis* of the contract; it is not necessarily so. The Plaintiffs' business is co-extensive with the civilized world. They could have sent the Defendant to travel for them anywhere. *Primâ facie* the law of the place where a

(1) 2 B. & Ad. 951.
(2) 4 Bing. 686.
(3) Law Rep. 6 Q. B. 139, 148.
(4) 16 M. & W. 346.
(5) 8 D. M. & G. 731.
(6) 16 C. B. (N.S.) 73.
(7) 4 App. Cas. 674.

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contract is made ought to be presumed to have been adopted by the parties as the footing upon which they dealt, and that law ought to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is situate in another country: *Lloyd* v. *Guibert* (1). Neither of those exceptions apply to the present case. As to the French judgment, the Plaintiffs by commencing the present action have done all that is necessary to execute the judgment.

[FRY, J.:—I am inclined to think that a judgment cannot be said to be executed unless an effort is made to execute it in the country in which it is obtained.]

A foreign judgment either creates an obligation or furnishes evidence of an obligation. It is sufficient that an obligation on the part of the Defendant existed on the 1st of March, 1879, when the writ in this action was issued. The Plaintiffs followed the regular course of procedure in the French Court. The Defendant has agreed to be bound by French law. When he entered into the agreement he was under the orders of a French house, and owed allegiance to French law. He was not a mere passer through *France* at the time.

FRY, J.:—

The Plaintiffs seek relief on two grounds: on a contract contained in a letter of the 9th of October, 1869, and on a judgment of the Tribunal of Commerce at *Epernay* in *France* of the 6th of November, 1878. The two subjects require entirely separate consideration. But few facts are in controversy between the parties, and it does not therefore appear to me to be necessary to state in detail the history of the case.

The first argument raised on the part of the Defendant is, that no breach of the contract has been committed by him. It becomes therefore necessary to consider the terms of the contract. [His Lordship referred to the letter of the 9th of October, 1869.] The question in dispute has been this, What is the meaning of the words "the champagne trade" in the clause which I have read? In my

(1) Law Rep. 1 Q. B. 115, 122.

judgment they refer to the trade of exporting from *Champagne* or importing into this country the wines of *Champagne*. It has been urged that they necessarily involve also the making of the wine in *Champagne*. It appears to me, however, that that is not a necessary part of the champagne trade, because the trade may be carried on without that, as is shewn in the present case. The Defendant buys his wine in *Champagne*, and imports it from *Champagne* into this country, and he affixes to the bottles of wine which he brings over his own brand, which indicates that he is an importer, that he has selected the wine, and that, in a certain sense, he is a guarantor of its excellency, and he has placed upon the brand the name of the place at which he buys the wine, namely, *Ay*, in *Champagne*. I hold those acts a breach of the contract.

In the next place, it is said that the contract is bad in law. It has been suggested that there is no sufficient consideration shewn, but, as Mr. *North* has declined, in the state of the authorities, to argue that point before me, it does not require adjudication at my hands.

In the next place, it is said that the contract is not reasonable, and it is unquestionably the law of this country that contracts of this description, being in restraint of the freedom of trade, must be reasonable.

Now, what is the criterion by which the reasonableness of the contract is to be judged? I will take the law on that point from the language of Chief Justice *Tindal*, in delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench, in *Hitchcock* v. *Coker* (1). He said (2): "We agree in the general principle adopted by the Court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." That passage was adopted by Lord *Wensleydale*, when a Baron of the Court of Exchequer, in delivering judgment in *Ward* v. *Byrne* (3), and therefore the rule so expressed has the authority of the Courts of Queen's Bench, Exchequer, and Exchequer Chamber. If, there-

(1) 6 A. & E. 438. (2) 6 A. & E. 454.
(3) 5 M. & W. 548, 561.

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fore, the extent of the restraint is not greater than can possibly be required for the protection of the Plaintiff, it is not unreasonable.

Another case which in my view throws great light upon this question is *Tallis* v. *Tallis* (1). There the plaintiff and the defendant had been partners as publishers of books. Part of their trade, called the canvassing trade, consisted in publishing books in numbers, and employing travellers to sell such books by canvassing for purchasers. The partnership was dissolved, the plaintiff being the continuing partner. The defendant agreed, amongst other things, not directly or indirectly to be concerned in the canvassing trade in *London* or within 150 miles of the General Post Office, nor in *Dublin* or *Edinburgh*, or within fifty miles of either, nor in any town in *Great Britain* or *Ireland* in which the plaintiff or his successors might at the time have an establishment, or might have had one within the six months preceding. The action was for a breach of the covenant. It was pleaded, amongst other things, that there were numerous works which the plaintiff did not publish, and had no intention of publishing, and that many of such works might be published by the defendant with advantage to the public and without injury to the plaintiff; that the canvassing trade applied to all such books; and that the restraint, as to the canvassing trade as applicable to such books, was unreasonable. The Court upon those pleadings, and upon a demurrer, held that the declaration was good, it not appearing that the restraint was unreasonable. And in giving judgment they considered a *dictum* in *Mitchel* v. *Reynolds* (2), to the effect "that wherever such contract *stat indifferenter*, and for aught appears may be either good or bad, the law presumes it *primâ facie* to be bad." But, instead of adopting that view, they called attention to what was said by the Court of Exchequer in *Mallan* v. *May* (3), "that it would be better to lay down such a limit as, under any circumstances, would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid." And further on in their judgment they said this: "Even if the facts therein" (in the pleas) "stated are taken to be admitted by the demurrer, and that the

(1) 1 E. & B. 391. (2) 1 P. Wms. 181, 191.
(3) 11 M. & W. 653, 667.

reasonableness of the restriction in question is to be considered with reference to those facts together with the facts alleged in the declaration, still we think the pleas bad. For, although the books capable of republication may be almost infinite, still the number of subscribers to such republications coming out in numbers is limited; and although, if the defendant's books are excluded, it does not follow that the plaintiff's books would be purchased, still we cannot ascertain that the number of subscribers to the plaintiff's books would not be diminished if the defendant competed with him by offering other books, especially if they were of a similar character. And, unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to we ought not to hold the contract void." In other words, the Court of Queen's Bench threw upon the defendant, who alleged the invalidity of the contract on this ground, the burden of shewing that it was plainly and obviously clear that the protection extended, by the proposed exclusion of the defendant's publications, beyond what the plaintiff's interests required. And such, in my opinion, ought to be the rule of law upon this point, because the Defendant is seeking to put a restraint upon the freedom of contract, and he who does that must, I think, shew that it is plainly necessary for the purposes of freedom of trade. I adopt the views expressed by the Master of the Rolls in *Printing and Numerical, &c., Company* v. *Sampson* (1), as to the necessity of Courts being careful how they invade the freedom of contract.

The question then arises, does the Defendant in the present case discharge the burthen so cast upon him? In answering that I must consider the facts of the case. It appears that at the time this contract was entered into the Defendant had for some two years been acting as the representative of the Plaintiffs in *England*. His custom appears to have been under their directions to travel over all parts of *England* and over *Scotland*, and at a subsequent date he visited *Holland* for the purposes of their trade. He had by a residence of some four months in *Epernay* at the

(1) Law Rep. 19 Eq. 462.

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house of the principal Plaintiff acquired a knowledge of the Plaintiffs' trade as carried on in *France*. He was therefore acquainted with the trade at both its ends. He was a relative of the Plaintiffs, and bore their name. Looking, therefore, at the extent of the trade carried on by the Plaintiffs, and its diffusion over the whole of *England;* looking at the facilities which now exist for carrying on trade in various places by means of the freedom of communication which exists between them, I cannot say that it has been made plain and obvious to me that this contract exceeds in its extent that to which the Plaintiffs were entitled for the protection of their trade. No doubt criticisms may be made on the contract, and it may be said that you can conceive cases to which the restraint would apply in which no injury would be done to the Plaintiffs. But that observation would have applied to *Tallis* v. *Tallis* (1), and when I bear in mind the devious channels through which trade is influenced, and the great difficulty of providing for every possible case in which injury might arise, without including possible cases in which injury might not arise, I have come to the conclusion that it has not been shewn that this contract is larger than is necessary for the reasonable protection of the Plaintiffs, and I hold, therefore, that this objection fails.

But then it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract being in its terms unlimited as to space, and therefore extending to the whole of *England* and *Wales*, must be void.

Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule if it existed would apply in two classes of cases. It would apply where the want of a limitation of space

(1) 1 E. & B. 391.

was unreasonable, and also where it was reasonable. Now in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the universality of the prohibition was reasonable, that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority.

In the next place, the rule is pressed upon me as an artificial rule, an absolute rule, or, as it was called by the late Vice-Chancellor *Wickens*, a hard and fast rule. Such a rule might always be evaded by a single exception. No exception can be said to be colourable to a rule of this description, because you can only judge whether an exception be colourable or not by the principle of the rule, and if the rule be really an artificial one without principle, there is no criterion for saying whether the evasion is colourable or not. It appears to me for these reasons that I ought not to hold such a rule to exist unless it be clearly established.

How then stand the authorities upon the point? There are undoubtedly cases in which it has been said that the restraint must not be universal. Such are *Ward* v. *Byrne* (1) and *Hinde* v. *Gray* (2); but looking to the judgments in those cases, and reading them with a view to the subject-matter, they appear to me to relate only to cases in which the universality is unreasonable, and more than once in *Ward* v. *Byrne* the rule is so explained, although I candidly admit that you may select other passages in which the Court seems to say that the universality is of itself an objection to the contract. Undoubtedly, Vice-Chancellor *Wickens*, of whose judgments I can never speak without the highest respect, came to the conclusion that such an artificial rule existed, and he so expressed himself in *Allsopp* v. *Wheatcroft* (3). He said (4) that "there has been a natural inclination of the Courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases, that a covenant not to

(1) 5 M. & W. 548.
(2) 1 Man. & G. 195.
(3) Law Rep. 15 Eq. 59.
(4) Ibid. 64.

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carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in *Ward* v. *Byrne* (1), and in *Hinde* v. *Gray* (2), and in other cases; and the rule, if not obviously just, is, at any rate, simple and very convenient. No doubt in the case of *Leather Cloth Company* v. *Lorsont* (3), Lord Justice (then Vice-Chancellor) *James* threw some doubt on the existence of a hard and fast rule, which makes a covenant in restraint of trade invalid, if unlimited in area." There are earlier cases than the one before the Vice-Chancellor *James* which seem to me to be inconsistent with the existence of the supposed hard and fast rule. In *Whittaker* v. *Howe* (4), a case relating to an attorney's business, it was stipulated that the business should not be carried on in any part of *Great Britain* for twenty years; again, in *Jones* v. *Lees* (5), the covenant was against selling a particular article anywhere in *England* without the invention of the plaintiff applied to it, and the objection that the covenant was unlimited as to space was taken. "It is objected," said Mr. Baron *Bramwell*, "that the restraint extends to all *England;* but so does the privilege. The cases with respect to the sale of a goodwill do not apply, because the trade, which is the subject-matter of the sale, is local, and therefore a prohibition against carrying it on beyond that locality would be useless." In other words, the learned Judge explains the inclination of the Courts against the universality of a prohibition as applying only to cases where the subject-matter of the sale was itself local. That is just the view I take of the earlier cases. Still more important are the observations of Lord Justice *James* in *Leather Cloth Company* v. *Lorsont*, where he undoubtedly came to the conclusion that no such rule had been laid down as has been insisted on before me. Having referred to the cases he says (6): "I do not read the cases as having laid down that irrebuttable presumption which was insisted on with so much power by Mr. *Cohen*. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural and not unreasonable for

(1) 5 M. & W. 548.
(2) 1 Man. & G. 195.
(3) Law Rep. 9 Eq. 345
(4) 3 Beav. 383.
(5) 1 H. & N. 189.
(6) Law Rep. 9 Eq. 353.

the protection of the parties in dealing legally with some subject-matter of contract." I have, therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule, and, for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases, in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable. It follows, therefore, that, in my judgment, the Plaintiffs have established their right upon the contract to an injunction, the terms of which I will mention presently.

No sufficient evidence has been given to induce me to award substantial damages, and I therefore award the Plaintiffs the sum of 1*s.*, and no more.

Before leaving this part of the case I wish to refer to two other points raised by Mr. *Cookson*, because they were fully argued by him. He has insisted that, even if the contract was void by the law of *England* as against public policy, yet, inasmuch as the contract was made in *France*, it must be good here, because the law of *France* knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this Court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the Courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else. Again, Mr. *Cookson* urged that, although the policy of this country promotes trade amongst its native subjects, there is no such policy in favour of trade carried on here by foreign merchants, and no such leaning of the English law in favour of their trade. It appears to me that that view cannot be maintained. And, as an elementary point may be met by a citation from an elementary book, I will only refer to a passage in Mr. Justice *Blackstone's* Commentaries, in which he deals with the mode in which the English law has regarded trade by foreign merchants. He says (1): "The law of

(1) 21st Ed. vol. i. p. 260.

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England as a commercial country pays very particular regard to foreign merchants in innumerable instances," and then he goes on to refer to the provision of Magna Charta in favour of foreign merchants.

I hold, therfore, that neither of those two arguments could succeed.

I next approach the question of the judgment obtained by the Plaintiffs in the Tribunal of Commerce at *Epernay* on the 6th of November, 1878. That judgment, according to the evidence before me, was obtained without any notice to the Defendant. He knew nothing of the pendency of the proceedings until they had matured into a judgment. It has not been shewn that according to the law of *France* the Defendant has had any opportunity or power of setting aside that judgment. The question was put to the French advocate who gave evidence, and he appeared to know nothing of any such provision in the French law, as seems to have been proved in some other cases. Moreover, it has been proved by him that this judgment became void according to the French law if it was not executed within six months, or if the utmost efforts to execute it were not made within that time. It has not been proved that any such efforts have been used, or that execution has been had upon the judgment.

Then arises the question how far the Defendant is bound by it, and the law upon this point, I think, I may conveniently take from the case of *Schibsby* v. *Westenholtz* (1), which has been so much discussed in the course of the argument. In that case the Court considered the principles on which foreign judgments are enforced by Courts of this country, and they said (2): "We think, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in *England* is that stated by *Parke*, B., in *Russell* v. *Smyth* (3), and again repeated by him in *Williams* v. *Jones* (4), that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or

(1) Law Rep. 6 Q. B. 155.
(2) Ibid. 159.
(3) 9 M. & W. 810, 819.
(4) 13 M. & W. 628, 633.

forms a legal excuse for not performing it, is a defence to the action." What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case, and to *Copin* v. *Adamson* (1), they may, I think, be stated thus. The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and, possibly, if *Becquet* v. *MacCarthy* (2) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction. Now, none of those cases include the present case. Here the contract was made between one of the Plaintiffs, a French subject, and the Defendant, a Swiss subject at the time of the contract domiciled in *Switzerland* but resident in *England*, he having been for some two years established there as the English correspondent or representative of the Plaintiffs' firm. He made the contract during a short stay at *Epernay*, on his return home from a visit to his mother in *Switzerland*. At the time of making the contract there was no intention on his part, or, so far as I can gather, on the part of the Plaintiffs, that he should take up his residence in *France*, and it does not appear to me that either party contemplated the performance of the contract in *France*, although, the terms of it being universal, it might be observed or broken anywhere.

In that state of circumstances, can I find anything which makes it reasonable to say that the Defendant ought to be bound by the decision of the foreign Court? I cannot; and therefore it appears to me that the Defendant is at liberty to say that he is not in any way bound by the judgment so obtained against him in the foreign Court, without notice, and to which he has in no way submitted. I therefore hold that the judgment cannot be enforced in this

(1) Law Rep. 9 Ex. 345. (2) 2 B. & Ad. 951.

FRY, J.
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country, and that the whole of the relief sought by the Plaintiffs in respect of it fails.

Having regard to the large extent to which the Plaintiffs have failed, I think that the reasonable course will be to let each party bear his own costs.

There will, therefore, be judgment for the Plaintiffs to the extent of an injunction restraining the Defendant from carrying on business as an importer of champagne for the period of ten years from the 1st of March, 1877, and from in any other manner acting in contravention of his contract, with one shilling damages, and no costs. And I dismiss the action so far as it seeks to enforce the French judgment.

Solicitors for Plaintiffs: *Janson, Cobb, & Pearson.*
Solicitor for Defendant: *C. F. Emmott.*

FRY, J.
1880
April 9.

REES *v.* METROPOLITAN BOARD OF WORKS.

[1879 R. 156.]

Mortgagor and Mortgagee—Foreclosure Action—Accounts—Form of Inquiry—Mortgaged Property purchased by Public Body under Statutory Powers—Extra Costs of ascertaining Compensation—"Just Allowances."

Mortgaged property, the subject of a foreclosure action, was purchased by a public body under their statutory powers, and the sum which had been assessed for compensation was paid into Court:—

Held, that the mortgagee was only entitled to the ordinary inquiry whether anything and what was due to him for any and what costs, charges, and expenses properly incurred by him in respect of his mortgage security, and that he was not entitled to an express direction for the allowance of his extra costs (beyond those allowed on taxation between himself and the public body) of the inquiry to assess the compensation.

THIS was an action by a first mortgagee of leasehold property against the Metropolitan Board of Works, who had purchased the property under their statutory powers, the mortgagor, some subsequent mortgagees, and the wife of the mortgagor, who, in an action for divorce against her husband, had obtained an order for the

payment to her of a sum of £193 for alimony and costs, and had afterwards obtained a garnishee order charging all debts owing or accruing due from the board to her husband, with payment of the £193 to her. The Plaintiff's mortgage deed contained no special provisions as to the costs which he was to be entitled to charge against the mortgaged property. After the issue of the writ, and before the statement of claim was delivered, the board paid into Court the sum of £900, which had been assessed as the value of the property, and paid to the Plaintiff his taxed costs of the inquiry, and an order was made that all further proceedings in the action as against the board should be stayed. By his statement of claim the Plaintiff alleged that he had incurred costs and charges in and about the assessing of the £900 as the value of the property, in addition to the costs paid to him by the board on the taxation, and he claimed to be entitled to be paid these additional costs and charges out of the £900, in priority to the claims of the other Defendants. He claimed an account of what was due to him for principal, interest, and costs under and by virtue of his mortgage, and for rent and other outgoings, and costs and charges paid and incurred by him in respect or on account of the mortgaged premises, and payment to him out of the fund in Court of what should be found due to him on the taking of the account, and also his costs of the action.

North, Q.C., and *Nalder*, for the Plaintiff:—

There should be an express direction that the Plaintiff is to be allowed his extra costs of the inquiry. In cases of compulsory purchase of settled property by a railway company the tenant for life has been allowed out of the purchase-money his extra costs (not paid by the company) in relation to the purchase: *In re Earl Berkeley's Will* (1); *In re Oldham's Estate* (before Vice-Chancellor *Wickens*, July 27th, 1871); *In re Strathmore Estates* (2).

[FRY, J., referred to *Blackford* v. *Davis* (3).]

Cookson, Q.C., and *A. C. Eddis*, for the wife.

The other Defendants did not appear.

(1) Law Rep. 10 Ch. 56. (2) Law Rep. 18 Eq. 338.
(3) Law Rep. 4 Ch. 304.

FRY, J.

1880

REES v. METROPOLITAN BOARD OF WORKS.

FRY, J.:—

I am not disposed to depart from the ordinary form of inquiry given in *Seton* on Decrees (1), viz., an inquiry "whether anything and what is due to the Plaintiff for any and what costs, charges, and expenses properly incurred by him in respect of his mortgage security," not being costs of the action. Under that inquiry the Plaintiff is entitled to all just allowances. The costs in question are either just allowances or they are not; if they are, the Plaintiff will get them under the ordinary inquiry; if they are not, he ought not to get them at all. It is for him to shew me that the ordinary form will not do justice to him. In *Blackford* v. *Davis* (2) Lord Justice *Selwyn* said: "I think it is of the greatest importance to adhere as far as possible to the common forms of decree. They have been found, after long experience, to work well in practice." I shall not go beyond the ordinary form of inquiry.

Solicitors: *A. R. Steele; Boyce & Ridley.*

FRY, J.

1880

April 14.

BALLARD *v.* MARSDEN.

[1879 B. 406.]

Executors—Assent to Legacy—Right to impound—Debt of Legatee.

Executors who have set apart and appropriated assets to meet a legacy, cannot retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of the testator.

MRS. *CROSS*, widow, who died in 1876, by her will dated the 27th of November, 1873, gave to the Defendants *Marsden* and *Thompson* (whom she appointed her executors) the sum of £1000 upon trusts which were to invest, and to pay the income to Miss *Harvey* for her life.

The Defendants *Marsden* and *Thompson* purchased, in 1877, a sum of *East Indian Railway* stock, which they set apart to meet the legacy given to Miss *Harvey*, and their solicitors wrote a letter of the 28th of May, 1877, to Miss *Harvey*, which the Court held

(1) 4th Ed. vol. ii. p. 1072. (2) Law Rep. 4 Ch. 308.

to be an admission that the *East Indian* stock was so appropriated and made payable to her.

The Plaintiff was the mortgagee of Miss *Harvey's* life interest in the legacy by virtue of a mortgage dated the 19th of October, 1877, and, being unable to obtain any payments on account of the income from the Defendants *Marsden* and *Thompson*, she instituted this action, praying for a receiver of the sum of *Indian Railway* stock.

The Defendants *Marsden* and *Thompson* resisted the Plaintiff's claim, and set up a claim to impound and retain, as against Miss *Harvey* and the Plaintiff her mortgagee, the income of the *Indian Railway* stock, under the following circumstances:—

Mrs. *Cross*, the testatrix, was, under a lease dated in 1857, lessee from Lord *Ashburnham* for twenty-one years of a messuage, which she covenanted to keep in repair, and this lease, some time after the year 1862, became vested in Miss *Harvey*, who covenanted to indemnify Mrs. *Cross* and her executors against the covenants. Miss *Harvey* did not keep the messuage in repair, and Lord *Ashburnham* made a claim for dilapidations upon the Defendants *Marsden* and *Thompson*, as executors of Mrs. *Cross*, in September, 1877, and the amount due for dilapidations was assessed at £324 6*s.* 7*d.* on the 18th of February, 1878. This sum was paid by the Defendants out of the estate of Mrs. *Cross*, and they claimed to impound and retain the life interest of Miss *Harvey* in her legacy to make good the sum which she was bound to pay under her covenant for indemnity.

Cookson, Q.C., and *Parkin*, for the Plaintiff:—

The Defendants cannot impound this life interest. They are in the position of trustees for Miss *Harvey* and her mortgagee of this legacy; *Phillipo* v. *Munnings* (1); *Stephens* v. *Venables* (2).

Miss *Harvey's* liability is not under the same instrument which creates her right to the legacy.

As executors they have no right to impound the income of a legacy which they have set apart for the legatee; they have become trustees of the legacy, and cannot retain any part of it for moneys which they claim in their capacity as executors.

(1) 2 My. & Cr. 309. (2) 30 Beav. 625.

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Lord *Ashburnham's* claim did not ripen into a debt until four months after the Plaintiff's mortgage.

An assent to a legacy once given cannot be retracted by the executors, but is positive for all purposes.

North, Q.C., and *J. G. Wood*, for the Defendant executors :—

The executors have a right to set off the liability of Miss *Harvey* against her legacy : *Priddy* v. *Rose* (1) ; *Willes* v. *Greenhill* (2). In *Brandon* v. *Brandon* (3) it does not appear that the set-off was to meet a liability created under the same instrument : *In re Hodgson* (4) ; *In re Batchelor* (5).

FRY, J. :—

The Plaintiff in this case seeks to recover the money due to her as mortgagee of the life interest of *Mary Harvey* in £1000 bequeathed by *Mary Anne Cross*, and in the securities now representing that sum. A sum of *East Indian Railway* stock has been set apart by the executors of Mrs. *Cross's* will to meet this legacy, and it is material to observe that before such setting apart Miss *Harvey* could not have recovered her legacy without administration of the estate of the testator, but since such setting apart she could have gone against the *Indian Railway* stock as a trust fund without interfering with the general estate. Similarly, had the investment in the *Indian Railway* stock turned out badly, she could not after such appropriation have gone against the general estate to make good her loss, while, had the stock improved, she and not the estate would have had the benefit of the rise. The stock was a trust fund held by the two executors for the purpose of meeting Miss *Harvey's* legacy.

The executors, however, claim a right in priority to the Plaintiff's mortgage to retain a sum of money due from Miss *Harvey* to the general estate of the testatrix. Lord *Ashburnham's* claim was first made on the 28th of September, 1877, and the amount due for dilapidations was assessed by three surveyors at £324 6*s.* 7*d.*

(1) 3 Mer. 86.
(2) 29 Beav. 376.
(3) 3 De G. & J. 524.
(4) 9 Ch. D. 673.
(5) Law Rep. 16 Eq. 481.

on the 18th of February, 1878, which sum was paid by the executors out of the estate of the testatrix on the 13th of September, 1878, and the executors have since retained £131 8*s.* 1*d.* out of the dividends of the *Indian Railway* stock, and claim to be entitled to retain or set off against the Plaintiff's mortgage the whole of the £324 6*s.* 7*d.*

The Plaintiff had notice when she advanced the money of the claim made by Lord *Ashburnham*, so that she does not plead that she was a purchaser for value without notice, but merely puts in issue the question whether the executors have or have not the right to retain the amount necessary to satisfy the sum due to Lord *Ashburnham* out of the legacy of Miss *Harvey*.

Now I will consider the question first on principle. I can see no ground for such a contention. When the executors set apart the legacy it ought to be considered as set apart so as to facilitate the dealing with it by the legatee for every purpose. Why then should Lord *Ashburnham* or any other creditor have a right to call upon the specific legatee to give this benefit to the general estate of the testatrix, after the executors, who were aware of the claims of Lord *Ashburnham*, thought fit to set the legacy apart.

Secondly, are there any authorities in favour of the contention of the executors? There are two classes of cases on the subject which have been cited. The first class is where a testator has given a share of his residuary personal property to a person who has come under a liability to the testator; here the residuary legatee cannot take the legacy until he has satisfied the liability, for his share of the residue is only what remains after satisfying his liability to the testator. The second class of cases is those which are represented by *Priddy* v. *Rose* (1), where the benefit and the liability arise under one and the same instrument. Here, to use the language of Sir *W. Grant* in *Priddy* v. *Rose*, a man "cannot claim a benefit under a settlement without making good his part of it."

That principle does not apply to this case in which Miss *Harvey's* liability is to the Defendants *Marsden* and *Thompson*, as executors, but her right to the legacy is sustainable against them as trustees for her. I should be frustrating the intentions

(1) 3 Mer. 86.

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of all the parties if I were to direct this legacy, which has been set aside for her, to be applied according to the contention of the executors.

The costs of the action must be paid by the executors, who have set up an unfounded claim.

Solicitors for Plaintiff: *Sutton & Ommaney.*
Solicitor for Defendant: *T. N. Crosse.*

Ex parte MOORE & ROBINSON'S BANKING COMPANY. *In re* ARMYTAGE.

C. J. B.
1880
March 22; *April* 12, 19.

Mortgage of Stone Quarry—Fixtures—Tramways and Steam Crane—Bills of Sale Acts, 1854 *and* 1878.

By a deed of mortgage of a stone quarry the quarry was granted, together with the mills, buildings, steam engines, motive power, plant, fixed and moveable machinery, apparatus, rails, sleepers, implements, fittings, and fixtures of every description, then or at any time thereafter fixed to, or placed upon, the hereditaments; all in the same witnessing part.

The mortgage was executed after the passing of the *Bills of Sale Act*, 1878, but before the 1st of January, 1879, when that Act came into operation.

At the date of the mortgage there was a tramway in the quarry, and there was also a steam crane, cramped on to large stones, and kept in position by two guys:—

Held, that the tramway and crane were fixtures, and that the mortgage did not require registration either under the old or under the new *Bills of Sale Act*, in order to give the mortgagee the right to retain the tramways and crane as part of his security, as against a liquidation trustee.

Observations on the meaning and object of the 7th section of the *Bills of Sale Act*, 1878.

THIS was an appeal and cross-appeal from an order of the County Court at *Derby*.

By an indenture of mortgage, dated the 10th of December, 1878, and made between *Edward Green Armytage* and *James Green Armytage*, merchants, of the one part, and *Moore & Robinson's Nottinghamshire Banking Company*, of the other part, certain freehold hereditaments at *Brassington*, *Derbyshire*, including a stone quarry called the *Many Stones Quarry*, "together with the lime-kilns, stone sawing mills, buildings, steam engines, boilers, furnaces, shafts, gearing, motive power, plant, fixed and moveable machinery, apparatus, rails, sleepers, implements, fittings, and fixtures of every description, now or at any time hereafter fixed to, or placed upon, or used in or about the said hereditaments and premises, or any part thereof," were granted (in one *testatum*) by Messrs. *Armytage* to the *Banking Company*, to the use of the company, their successors and assigns for ever, subject to a proviso for redemption of the same premises on payment of the balance of the account current of the mortgagors with the *Banking Company*.

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The deed contained a power of sale in these terms: "And it is hereby agreed that it shall be lawful for the said company, their successors or assigns, at any time or times hereafter, without any further consent on the part of the mortgagors, their heirs or assigns, or any or either of them, to sell and absolutely dispose of the said hereditaments and premises hereinbefore expressed to be hereby granted, or any part or parts thereof, either together or in parcels, and either by public auction or private contract; with power upon any such sale to make any stipulations as to title or evidence, or commencement of title or otherwise, which the said company, their successors or assigns, shall deem proper, and for such price or prices as to them shall seem reasonable; with full power to buy in or rescind or vary any contract for sale, and to resell without being responsible for any loss to be occasioned thereby; and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as they shall think fit."

The deed further witnessed as follows: "That for the consideration aforesaid the said mortgagors do hereby attorn and become tenants from year to year to the said company, their successors and assigns, for and in respect of the hereditaments and premises hereinbefore expressed to be hereby granted, at the yearly rent of £400, payable by equal half-yearly instalments on the 10th day of June and the 10th day of December in each year, the first of such half-yearly payments to be made on the 10th day of June next. Provided always, and it is hereby agreed, that it shall be lawful for the said company, their successors and assigns, at any time hereafter, without giving previous notice of their intention so to do, to enter upon and take possession of the said premises whereof the mortgagors have attorned tenants as aforesaid, and to determine the tenancy created by the aforesaid attornment."

At the date of this mortgage there had been constructed and placed upon the soil of the quarry two items of property which were the subject of the present appeals.

One was a tramroad, or set of tramways, as to which there was conflicting evidence. On the part of the mortgagees it was stated that the sleepers to which the rails were bolted were embedded in and covered by the natural soil; also that as to part, where the soil

was rocky, there were no sleepers, and the rails were fixed to the rock by iron dogs or spikes driven into holes in which wooden plugs had been fixed. On the other hand, it was deposed that the sleepers were merely laid upon the ground, and were not embedded in the soil; and that when covered by ballast and rubbish, it was by accident only. As to the part where there were no sleepers, it was stated that the rails were laid upon blocks laid down upon the rocks for that purpose, and that in no instance were wooden plugs driven into the natural rock.

The other was a steam crane, which was set up on two blocks of stone, cramped together, and laid on a prepared bed of mortar. The crane was fixed to the stones by six bolts or screw-pins. The upright beam of the crane was supported by two guys or beams of wood, of which one end was attached to the top of the crane, the other being fastened to the ground. The end of the guy which was fastened to the crane was slipped on to a pin at the top of the upright beam, and there retained. The end which was on the ground was fastened to a block of rock, left unquarried for the purpose, by being slipped over a screw-pin let into the rock. The end was further steadied by a quantity of rubble and stones being piled upon it.

Part of the evidence was that the guys had been furnished by another different maker than the firm who supplied the crane.

The mortgage deed was not registered as a bill of sale.

On the 10th of June, 1879, the first half-yearly payment of rent under the above attornment clause became due, and was not paid.

On the 22nd of July, 1879, the mortgagors presented a liquidation petition, and at a first meeting of creditors a trustee and committee of inspection were duly appointed.

The trustee took possession of the property which was admitted to be comprised in the mortgage deed, besides certain stock-in-trade and loose chattels which were admittedly not within the deed, and were the partnership assets of the debtors, and to which the bank made no claim beyond a right to distrain them; and in consideration of the bank agreeing not to distrain for the half-year's rent, the trustee gave an undertaking not to remove any of the loose chattels without notice.

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On the 13th of November, 1879, the trustee advertised for sale the whole of the loose chattels in and about the quarry, including in the advertisement the steam crane and the tramways.

The bank thereupon applied for an injunction to restrain the trustee from selling or removing the "steam crane, tramrails, and any other fixed plant or machinery on the premises;" and an interim injunction was granted, the bank undertaking in damages.

Out of the proceeds of sale the trustee paid the bank £200 for the half-year's rent; and on the 2nd of January, 1880, the bank served the trustee with notice requiring him to decide whether he would disclaim the tenancy created by the attornment, to which the trustee on the 28th of January answered that he did disclaim the tenancy and possession of the quarry. No disclaimer beyond the above letter had been executed by the trustee.

On the 9th of February, 1880, the trustee served the bank with notice of motion for an order declaring that the steam crane and tramrails were the property of the trustee.

The application was heard on the 14th of February, and on that day an order was made by the learned County Court Judge declaring that the steam crane was the property of the mortgagees, the bank, and that the tramrails were the property of the trustee, as representing the estate of the mortgagors, the liquidating debtors.

This was the order appealed from.

On the 6th of March was dated and served notice of appeal motion on behalf of the bank, that the order might be reversed so far as it declared that the tramways belonged to the trustee.

A cross-appeal motion on behalf of the trustee, claiming the steam crane, had been served, but had not been entered, and was out of time at the date of the opening of the hearing.

De Gex, Q.C., and *Arnold Morley*, for the bank:—

The cross-appeal has not been entered, and the appeal on behalf of the trustee is not before the Court.

Winslow, Q.C., and *Horace Smith*, for the trustee, referred to *Ex parte Kiveton Coal Company* (1) and *Ex parte M'Kenna* (2).

(1) Law Rep. 7 Ch. 730.

(2) 30 L. J. (Bkcy.) 24.

De Gex not objecting,

Bacon, C.J., said that if the trustee paid the deposit his appeal might be heard, along with the appeal of the banking company.

De Gex, Q.C., and *Morley*, in continuation:—

This deed was executed on the 10th of December, 1878, which was after the passing of the *Bills of Sale Act*, 1878 (22nd of July, 1878), but before the commencement of the Act, which was fixed at the 1st of January, 1879; so that this is a deed under the law as it stood before the Act of 1878.

The retrospective rule of construction in sect. 7 of the Act of 1878 has no application here, because the fixtures are not "assigned by separate words," nor is "power given to sever them from the land" to which they are affixed. Nor does the word "fixtures" in the second paragraph of sect. 7 mean fixtures as defined by the new Act.

But even if this were a deed under the new Act, these items of property would be by sect. 5 excepted out of the new statutory rule that trade machinery is (sect. 5) to be deemed personal chattels: so that neither under the old nor the new Act did the deed require registration.

Being, as the case is, under the old Act, the question comes round to this, whether these things are fixtures or not, and as to this the evidence is clear. [Upon this the evidence was read.]

This was a mortgage of freeholds, as in *Mather* v. *Fraser* (1), where Lord *Hatherley*, when Vice-Chancellor *Wood*, held that machinery placed upon land for the purpose of trade and manufacture, being placed there for the purpose of better and more profitably enjoying the land, would pass with the freehold; and none the less because the deed, whereby the land was granted, contained a subsequent enumeration of the articles of machinery. Accordingly he held that the *Bills of Sale Act*, 1854, did not apply. This was treated as settled law in *Longbottom* v. *Berry* (2), *per Lush* and *Hannen*, JJ. (3); and in the Exchequer Chamber, in *Holland* v. *Hodgson* (4), *per Blackburn*, J. In *Turner* v. *Cameron* (5)

(1) 2 K. & J. 536. (3) Law Rep. 5 Q. B. 137.
(2) Law Rep. 5 Q. B. 123. (4) Ibid. 7 C. P. 328.
(5) Law Rep. 5 Q. B. 306.

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tramways in a mine which had been leased were held not distrainable, on the ground that they were part of the freehold, and not chattels.

What was aimed at by the 7th section of the *Bills of Sale Act*, 1878, was this: Vice-Chancellor *Wood's* decision in *Mather* v. *Fraser* (1) was dissented from by Vice-Chancellor *Malins* in a case of *Begbie* v. *Fenwick* (2), where the land passed by one witnessing part, and the machinery by another, that being, however, the case of a demise; and Vice-Chancellor *Malins'* expression of dissent was followed by the Lords Justices in *Ex parte Daglish* (3); and what the Act of 1878 says is in effect this, that no matter how the fixtures are conveyed, whether in different parts of the deed, or in the same part, they are not to be considered as assigned separately. The Act of 1878 does not say that all old bills of sale are to be within the Act, only that all old bills of sale are, in cases of doubt, to be construed in a particular way.

As to the crane, the guys were part of the crane, and they, without doubt, are fixtures: *Fitzherbert* v. *Shaw* (4); *Lawton* v. *Salmon* (5).

Winslow, Q.C., and *Horace Smith*, for the trustee:—

The deed comprises everything in the quarry, whether fixed or not fixed. No one questions that, as against the trustee, the deed must have been registered in order to carry the moveables; and these things, we say, were moveables. The deed differs in this respect from the instrument in *Mather* v. *Fraser*, which did not comprise loose chattels. That was a mortgage of the fee and fixtures only.

In *Waterfall* v. *Penistone* (6), which was subsequent to *Mather* v. *Fraser*, the Court held that the decision in *Mather* v. *Fraser* did not apply where it was clear that the parties intended to treat the machinery as chattels.

So, in this case, the land, fixtures, and chattels being all mixed up together, a power was given to the mortgagee to sell them altogether or separately: and it is clear the mortgagee might

(1) 2 K. & J. 536. 2 Jur N S 601
(2) Law Rep. 8 Ch. 1075, n.
(3) Ibid. 1072.
(4) 1 H. Bl. 258.
(5) Ibid. 259, n.
(6) 6 E. & B. 876. 3 Jur N S 15

have sold the machinery apart from the land. In *Ex parte Barclay* (1) a power to sell separately, in parcels, was held not to imply a power to disannex, because in that instance the meaning might be satisfied by a sale of certain cottages which passed with a public-house, but the decision recognised the principle of *Ex parte Daglish* (2) that the power to disannex was the true test of whether the deed required registration as a bill of sale or not.

As to the tramways, in *Duke of Beaufort* v. *Bates* (3), which is referred to in *Turner* v. *Cameron* (4), it was held that under a conveyance of "works, ways, and roads," a tramway did not pass.

As to the crane, there is no dispute as to the facts. Our contention is that it resembles the weighing machines in *Ex parte Astbury* (5), or the washing machines in *Longbottom* v. *Berry* (6). Not only is the crane moveable when the guys are taken off, but it is meant to be shifted about from one part of the quarry to another.

No doubt it was the conflict of authorities in *Mather* v. *Fraser* (7) on the one hand and *Begbie* v. *Fenwick* (8) and *Ex parte Daglish* on the other which led to the passing of the 7th section of the new *Bills of Sale Act;* just as it was the conflict of authority between *Sheridan* v. *McCartney* (9) and *Branton* v. *Griffits* (10) which induced the Legislature to insert mention of "growing crops" in the same clause. Then what does the section enact? That no fixtures or growing crops are to be deemed to be separately assigned, only because they are assigned by separate words, or that power is given to sever them from the land. The law is not altered that, where, as in *Ex parte Tweedy* (11), there is an obvious intention to deal with the fixtures separately and to sell them separately, they must be treated as chattels, and their assignment requires registration.

The effect of the new statute is this. It lays down a rule of

(1) Law Rep. 9 Ch. 576.
(2) Ibid. 8 Ch. 1072.
(3) 31 L. J. (Ch.) 481.
(4) Law Rep. 5 Q. B. 306, 314.
(5) Ibid. 4 Ch. 630.
(6) Law Rep. 5 Q. B. 123, 139.
(7) 2 K. & J. 536.
(8) Law Rep. 8 Ch. 1075, n.
(9) 11 Ir. C. L. Rep. (N.S.) 506.
(10) 1 C. P. D. 349; 2 C. P. D. 212.
(11) 5 Ch. D. 559.

C. J. B. 1880 *Ex parte* Moore & Robinson's Banking Company. *In re* Armytage.

construction, and then says that this rule shall be applied to all bills of sale, whether old or new, including fixtures or growing crops. It does not define what are fixtures; but it does define what are not fixtures, *i.e.*, what are personal chattels which if assigned must be registered. Amongst such personal chattels it includes trade machinery, with certain exceptions. Our contention is that these tramways and this steam crane are not within the exception, that they are trade machinery, and that, being trade machinery which has been assigned without registration, they pass, under the new Act, to the trustee.

Bacon, C.J.:—

This case has occupied a considerable time in argument, and I have listened with much interest to what has been said on either side, but feel no difficulty in deciding the questions that have been raised, whether of fact or upon the statute, the object of which was to remove doubts, and to make the law clear, not only as to deeds executed after the passing of the statute, but as to the construction of deeds executed before the statute.

Now the facts are all very plain, except as to one matter which has been referred to in the affidavits. That these things were plainly fixtures, I can entertain no doubt. Whether they are to be considered fixtures under the older authorities which held that things in order to be fixtures must be so affixed to the freehold as not to be removable without considerable force, or not, I consider that the rails and sleepers here are one single thing, and that such single thing has been put down in such a way as that it cannot be removed without doing damage to the freehold. If so, the property is in the mortgagee. It is not the case of a machine simply put down and resting on the ground by its own weight, like the washing machines that have been referred to. [His Lordship read the evidence as to the way in which the crane was set up, and observed:—] I can entertain no doubt that this also was a fixture, and passed to the mortgagee.

With regard to the statute, I quite agree with the suggestions made in the argument as to its meaning. No doubt the statute may be read as if it had said, Whereas Lord *Hatherley*, when

Vice-Chancellor Sir *W. Page Wood*, has decided, in *Mather* v. *Fraser* (1), that if an instrument which conveys an interest in land conveys also machinery fixed to the land, such instrument does not require registration; and whereas the Court of Exchequer Chamber, speaking by the mouth of Lord *Blackburn*, J., in *Holland* v. *Hodgson* (2), has referred to and entirely adopted that decision, in so doing following a decision of the Court of Queen's Bench in *Longbottom* v. *Berry* (3) to the same effect; and whereas other and contrary decisions have been arrived at by the Courts of Chancery; now to remove all doubts and difficulties, be it enacted; and so forth. And then the Legislature proceeds by enactment to establish and confirm the principle which had been laid down by Vice-Chancellor *Wood*.

The 4th section of the statute enacts that the expression "bills of sale" shall include bills of sale, assignments, and a great variety of other instruments there mentioned; and shall not include certain other instruments. I need not read that section at greater length, except that paragraph of it which defines personal chattels. It says, "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed."

Words cannot be plainer. As I have said, it is as if the statute had recited, Whereas the old Act of Parliament by its 7th section declared that "the expression 'personal chattels' shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery;" and whereas it has been held that the term "fixtures" in this section includes fixtures when assigned together with a freehold or leasehold interest in the land or building to which they are attached; now it is hereby enacted that the expression "personal chattels" shall not include fixtures (except trade machinery) which are assigned together with the land to which they are attached.

(1) 2 K. & J. 536. (2) Law Rep. 7 C. P. 328, 340.
(3) Law Rep. 5 Q. B. 123.

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Then follows the 5th section, which enacts that trade machinery shall be deemed to be personal chattels, that is to say, that an assignment of trade machinery must be registered as a bill of sale —with certain exceptions—such as fixed motive powers, water-wheels or engines, and fixed machinery which transmits the action of the motive powers.

And then the 7th section, upon which this question turns, defines what is meant by fixtures being "separately assigned or charged." It is enacted that fixtures shall not be deemed to be "separately assigned or charged" by reason only that they are assigned by separate words, or that power is given to disannex them; and then, for the sake of removing all doubt and difficulties arising out of conflicting decisions, it is provided that this rule of construction shall also apply to bills of sale that have been registered before the passing of the Act.

It now becomes necessary to examine the terms of the deed in this case. It is a mortgage deed, whereby the mortgagor, after granting certain freeholds, goes on in the same clause to add "together with the lime-kilns, stone sawing mills, buildings, steam-engines, boilers, furnaces, shafts, gearing, motive power, plant, fixed and moveable machinery, apparatus, rails, sleepers, implements, fittings and fixtures of every description now or at any time hereafter fixed to, or placed upon, or used in or about the said hereditaments and premises, or any part thereof."

So that, unless that which has been the law hitherto has been and is now declared to be all wrong, and a new law is introduced in its place, these things have certainly become the absolute property of the mortgagees, subject, of course, to the right of redemption. The deed assigning them does not require registration, because it is not within the mischief of the *Bills of Sale Act*, and to hold that they pass to the mortgagees is to oppose no decision that has hitherto been pronounced.

How, then, can I say that, under this Act of 1878, there can be any longer a doubt that the mortgagee, or any other assignee, who takes an interest in land, takes also chattels connected with the land in the way in which these things were connected? In my opinion it is clear, from the moment the deed was executed, they belonged to the mortgagee. The deed required no regis-

tration under the old law; and the 7th section of the new Act provides that a deed executed before the Act shall be read in such a way as that it would require no registration under the new law.

A distinction was attempted to be made as respects the guys. It is said that they are removable portions of the machine. But how can that affect the question? The use of the guys is to steady the machine. Then it was further argued that the guys were furnished by another person than the maker of the crane. But that can make no difference, for without these guys the crane could not have been properly worked.

Upon every ground the appeal of the trustee must fail; and the trustee must pay the mortgagees' costs here and below.

Solicitors: *T. W. Nelson*, agents for *Freeth, Rawson, & Cartwright, Nottingham; F. C. Greenfield*, agents for *Leech, Smith, & Broughall, Derby.*

C. A.
1880
March 15, 16.

In re AMBROSE LAKE TIN AND COPPER MINING COMPANY.

Ex parte TAYLOR.

Ex parte MOSS.

Company—Winding-up—Liability of Directors—Purchase from themselves on behalf of the Company—Fraud on the Public—Conversion of Cost-book Mine into Joint Stock Company.

17 Ch D 476, 480
W N 84, 54

The shareholders in a cost-book mine were desirous of converting it into a limited company. They accordingly assigned the mine to a trustee; and then *T.* and *M.*, the two principal shareholders, signed an agreement on behalf of the intended company to purchase the mine of the trustee for £24,000, to be paid in shares of the new company, partly paid up and partly unpaid. The value of the mine at that time was about £6000. The company was formed and registered with a nominal capital of £36,000 in 18,000 shares of £2 each, and *T.* and *M.* were two of the first directors. The agreement for purchase of the mine was sanctioned by the directors and carried into effect, and the whole of the shares in the company were allotted to the shareholders of the cost-book mine, some as paid-up and others as partly paid-up shares, to the nominal amount of £24,000. Afterwards the company was wound up, and the official liquidator claimed to make *T.* and *M.* account for the difference between the nominal value of their shares and the actual value of their interest in the cost-book mine:—

Held, that, although the scheme, by which the mine was estimated much beyond its true value, might have been intended to deceive the public, there was no fraud upon the company, all the members of which were parties to the arrangement; and that *T.* and *M.* were not accountable to the company for any profit they had made or might have made by the transaction.

THIS was an appeal from a decision of Mr. *Fisher*, the Vice-Warden of the Stannaries Court, in the winding-up of the *Ambrose Lake Tin and Copper Mining Company, Limited*, given on the 2nd of July, 1879.

In the course of the years 1870 and 1871 the Appellants, *Joseph Taylor* and *Joshua Moss*, became the principal proprietors of the *Ambrose Lake Mine*, which at that time was carried on as a cost-book company divided into 6000 shares. The concern was not prosperous, and it was determined by the shareholders to work the mine as a limited company. For that purpose the mine and machinery were assigned by the lessees to *W. Eaton*, a clerk

of *Taylor's:* and by a memorandum of agreement dated the 22nd of December, 1871, made between *W. Eaton* of the one part, and *Joseph Taylor* and *E. Hardey* of the other part, *Eaton* agreed to sell the mine and machinery to *Taylor* and *Hardey* in trust for a company to be called the *Ambrose Lake Tin and Copper Mining Company, Limited,* in consideration of the sum of £24,000, to be paid to *Eaton* in manner following, that is to say, 6000 fully paid-up shares of £2 each, and 12,000 shares with 20*s.* each considered as paid thereon.

This agreement was registered under the *Companies Act,* 1867, on the 26th of January, 1872.

The new company was registered on the 19th of January, 1872. The memorandum of association stated that the object of the company was to purchase and work the *Ambrose Lake Mine,* and that the capital of the company was to be £36,000, divided into 18,000 shares of £2 each.

By the articles of association the first directors were to be *Joshua Moss, Joseph Taylor, E. Hardey, William Moss,* and *J. Maguire,* all of whom had shares in the cost-book mine, and *Taylor* was appointed managing director. The memorandum and articles referred to the agreement which had been entered into with *Eaton* for the purchase of the mine.

At the first meeting of the directors it was resolved that the agreement should be adopted, and *Eaton* was credited with £24,000, namely, £12,000 on account of 6000 fully paid-up shares, and £12,000 on account of 12,000 shares with £1 paid on each. But in fact only five shares were allotted to *Eaton;* 2900 fully paid-up shares and 5650 shares with £1 paid up were allotted to *J. Moss;* 2880 fully paid-up shares and 5650 shares with £1 paid up were allotted to *J. Taylor;* and the rest of the shares were divided between the other shareholders in the cost-book mine according to their interest therein.

The value of the mine and machinery was considered by the Vice-Warden to have been about £6000.

Taylor sold a considerable number of his shares at a premium. *Moss* retained all his except 150.

No prospectus was issued to the public. The allottees paid up the remainder of the money due on the shares on which £1 only

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had been paid; but the company was not successful, and was wound up by an order of the Court on the 8th of January, 1878.

The official liquidator applied for orders against *Moss* and *Taylor*, charging them with having improperly sold the mine to the company for more than it was worth, and calling upon them to repay the difference between the value of their shares in the new company, including the profit on those which had been sold, and the value of their interests in the cost-book mine. The Vice-Warden took this view of the liability of the two Appellants, and in the result he ordered *Moss* to pay the sum of £6825, and *Taylor* the sum of £10,185.

From this order *Moss* and *Taylor* appealed.

Cookson, Q.C., and *Burton Buckley*, for the Appellant *Moss*; and *Waller*, Q.C., and *Bunting*, for the Appellant *Taylor*:—

This is nothing but an apportionment of the property among the old shareholders, and there is nothing of which anybody can complain. There are two classes of cases in which a liability for misfeasance has been established: where a person having property to sell makes directors and gives them a bribe out of the proceeds; and where a person having property to sell gives out of it a bribe to a person acting on behalf of the company: *Hay's Case* (1); *M'Kay's Case* (2). There was nothing of that kind here.

[JAMES, L.J.:—Those cases cannot apply here; this case seems more like *In re Gold Company* (3).]

The contract in the present case has been adjudicated on in *Clarke's Case* (4). There is no such misfeasance as in *De Ruvigne's Case* (5).

Ince, Q.C., and *Northmore Lawrence*, for the official liquidator:—

The contract was a misrepresentation from beginning to end. *Eaton* was not in possession of the mine and had no title to it. *Moss* and *Taylor* had constituted themselves trustees for the new company, and were buying the property from themselves for the company, and they bought it at a far higher price than it was

(1) Law Rep. 10 Ch. 593.
(2) 2 Ch. D. 1.
(3) 11 Ch. D. 701.
(4) 8 Ch. D. 635.
(5) 5 Ch. D. 306.

worth. Such a transaction cannot stand. It makes no difference of whom the company consisted at the time. It must be treated as having an independent existence, and those who now represent it have a right to call on the directors and all persons who stand in a fiduciary relation to it to account for their profits. *Moss* and *Taylor* made a profit by the transaction, for they received shares to the value of more than £22,000 in exchange for property which was worth only £6000. But if they made no profit themselves they prevented the company from making profit, by taking shares which the company might have allotted to the public. We are, therefore, entitled to call on them to make good what they have deprived us of, and that is measured by the value which might have been obtained by their shares in the market: *New Sombrero Phosphate Company* v. *Erlanger* (1); *Society of Practical Knowledge* v. *Abbot* (2); *Pearson's Case* (3); *Nant-y-glo and Blaina Ironworks Company* v. *Grave* (4); *Tyrrel* v. *Bank of London* (5); *M'Kay's Case* (6); *Carling's Case* (7); *Gover's Case* (8).

Waller, in reply, for *Taylor*.

Buckley, in reply, for *Moss*.

JAMES, L.J.:—

I am of opinion that the order of the Vice-Warden in this case cannot be sustained. It appears to me that one must look, even as between companies and directors, at what the substance of the transaction was as between the company and the persons whom the company is seeking to make answerable. Now the transaction appears to me to be quite clear, and I cannot help thinking myself there was an object in it, and that object was not at all an object for obtaining an undue advantage as between the company and the persons who are dealing with the company and selling to the company, but the obtaining an undue advantage in the stock market, wherever the stock market of the company might be, as between the persons who got the shares in the new company and

(1) 5 Ch. D. 73; 3 App. Cas. 1218.
(2) 2 Beav. 559.
(3) 5 Ch. D. 336.
(4) 12 Ch. D. 738.
(5) 10 H. L. C. 26.
(6) 2 Ch. D. 1.
(7) 1 Ch. D. 115.
(8) Law Rep. 20 Eq. 114.

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the persons who were foolish enough to buy the shares from them in the new company. They intended to represent the thing as worth something a great deal more than it was worth, namely, the nominal capital that was attributed to it.

Now what we have got here to consider is a sale in substance made by the vendors for themselves, as beneficially interested, to themselves as directors of the company, being in that sense in a fiduciary character towards the company, and the sale is a sale by themselves in the one character to themselves in the other character. Of course such a sale is a thing that cannot stand, if it is questioned in time, and proper offers made to restore the thing purchased. And if there is any difficulty in the way of restoration, if it is made out that they had received something beyond the proper price of the property, there ought to be no difficulty in making them pay that extra value. Suppose the property had been sold before the fraud was discovered, or suppose the *cestuis que trust* laid out a great deal of money in improvements, then the only mode of setting it right would be to make the vendors give the extra price which was paid for it. According to my view of this case the vendors did get no extra price from the company as a company. What the company got was the mine as it stood. The mine and machinery and plant, or whatever was on the property, was sold to them. Now what they gave for it was a certain share in the mine, the very property itself divided into a great number of shares, it was a certain share in the assets of the company; the assets of the company consisting only of the very thing which they had bought. No doubt they got the assets of the company at that moment, which consisted of their right to call up the unpaid part of the unpaid shares. But then the right to call up that was a liability upon the vendors themselves, so that the only thing which the company gave back to the vendors was what the vendors had given to them, and what they covenanted to give to them, that is to say, the property and the liability to contribute the money which was due on the shares.

Under these circumstances it seems to me impossible to say that, however wrong the transaction was in respect to other persons, there was anything wrong as between the company and

the vendors. There was no fraud on the existing shareholders, because they were parties to it. There was no fraud on any future allottees of shares, because there could be, under the circumstances at the time the arrangement was made and completed, no future allottees of shares. The transaction was a transaction in which the whole of the capital of the company was given in exchange for the property purchased.

That being so, it seems to me that the numerous other questions which have arisen in this matter, and which have been discussed at some length and with considerable ability, do not arise. In my view, the company only gave back in substance that which it was getting, and the fraud was not between the vendors and the company, the purchasers, but was a thing calculated to delude people into believing that the shares when got were something more valuable than they really were. What the company lost, if they lost anything, was this: If they had formed the company and issued shares, they might have got the fictitious value which the shares would have brought in the market by availing themselves of the lies respecting the property, which they say are contained in the contract. That does not seem to me to be a sort of thing which the company would be entitled to claim. I rest my decision on the ground which was opened by the Appellants' counsel, particularly by Mr. *Buckley*, that what was taken back was the very thing that was given in exchange for it, calling it by different names and dividing it into different shares.

Brett, L.J.:—

Whether a fraud upon which any action can be taken has been committed in this case I am not prepared at present to say, but that a fraud was intended I have not the least doubt. The transaction has all the badges of fraud, but I think that the claim which is now made fails altogether; because, even if the right parties are suing, they have not asked for the right remedy; and I also think the parties suing are not the parties who were intended to be defrauded on this occasion.

Now, it seems to me the facts are these, that certain persons were the owners of the mine, and they had worked it for a certain time, and they knew it was a perfect failure; that they then, in

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order to retrieve that failure, pretended themselves to make this arrangement, that as to that mine, which was a failing mine, probably worth nothing, they might pretend to buy the mine from a person other than themselves, although they were really (if it can be called a purchase at all) buying it from themselves for £24,000, but that they might then risk a further sum of £12,000, making up £36,000, so as to work the mine for a certain time, and then the mine appearing to have been bought for £24,000, and £12,000 being advanced by them to work it, it would appear to the outside public to be a profitable mine, and then the shares might be sold at a profit, and so, instead of having a failing mine in which they were wasting their capital, by risking £12,000 more they would be able to place shares with the public, retrieve what they lost, leaving the public to lose what they gave for the mine.

Now, many questions have been raised as to what would have been the effect if this had been done by directors of an existing company. It seems to me, the whole transaction was a solemn farce. This agreement which has been set out is a mere farce. These people were not acting as trustees for anybody, they were the people themselves, and that which is called a contract for purchase and sale being made by these people with themselves is no contract at all, or anything of the kind. Therefore, this agreement, which is set out, and pretends to represent an agreement of purchase and sale, is a mere falsehood. It is not a contract of purchase and sale, to my mind, for a price greater than they ought to have given, or a contract of purchase and sale for a certain price, if the supposed price is given back to the agent for the people complaining. The truth is, it is no contract at all, and this agreement which is set out is a mere farce. Therefore, the very constitution of the company, this turning of themselves by this mode into a limited company, is a mere representation. Whether the registration could have been set aside or not I really do not know, but the whole thing is a misrepresentation—to defraud whom? The people who were representing this farce did not deceive themselves; nor were the people supposed to be buying nor the people supposed to be selling deceived. Is there any deception at all? The whole thing was done by the same people.

There was nobody in the limits of company who was deceived in the least. It is impossible, in my mind, to suppose that it had no business purpose, and that it was not intended to produce some effect. On whom could it produce that effect? It could not produce that effect on the parties themselves. It is quite true to say, inasmuch as they were the same people, they gave nothing for this mine and received nothing for this mine. The supposed purchaser gave nothing, the supposed seller received nothing, and the only people who would be deceived would be the outside public; but how would they be deceived? If anybody who had shares in the new company has sold those shares to anybody of the outside public upon the faith of those documents which are contained in these articles of association, or memorandum,—if they have sold their shares on the faith of that simulated agreement for the purchase of the mine being a true one, it seems to me they have obtained the money from those purchasers by fraud.

To shew that, it must be shewn that a vendor of shares in the company did sell to the purchasers shares in the company, and that the persons who bought the shares purchased them on the faith of this agreement, and the representations made in it. If that should ever be proved, that would give a remedy to any person who has so been deceived against the person who made these representations to him, that is, against the individual. There would be no liability on the part of the company as such. Therefore, there has been no mischief done to the company as the company, and it seems to me, therefore, the latter has no remedy at all. However improper or disreputable, as my Lord says, this transaction was, it did no mischief to anybody whom the liquidator represents, and it could only do mischief to people who may have been deceived, but we cannot tell now whether anybody has been deceived. Those persons are not before the Court. Therefore the remedy sought here is by the wrong persons and in the wrong form.

Cotton, L.J.:—

The first question we have to consider is whether or no the order of the Vice-Warden can be supported as it stands, and that

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I will deal with first. As I understand his order, he has done this; he has allowed each of the Appellants in the two appeals such a sum as was paid by him on his acquisition of the shares in the mine in question, and then, giving credit for that, has charged him with the difference between that sum and what he considers as the value of the shares. The principle of the order must be this, that the company are at liberty to treat these persons as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and if they got anything else out of the coffers of the company, to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time when the so-called vendor acquired the property he either acquired it for the company, or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. In that case what the Court does is to go back to the original purchase made by the person who afterwards purports to sell to the company at an advanced price, and to say this was already the company's at the price which you originally gave for it when you were a trustee for the company. That price you are entitled to receive out of the coffers of the company, and anything else is a sum paid to you for nothing, which you are not entitled to retain. But here, as far as I understand the evidence and the judgment, there is no ground for suggesting that at the time when Mr. *Moss* acquired his interest in the cost-book mine he was acquiring it as a trustee for the company, nor do I understand that is suggested as regards the other partners in the cost-book mine. The suggestion is that they bought, being both owners of the mine and trustees of the company; that they could not legally do this; and that therefore the company, not seeking to set aside the transaction, may say, "We will take this at its fair value, and make you account for the difference." How can that be done? I can quite understand an action to set aside the contract altogether, but that is not the course adopted by the company. I can see no ground either on principle or authority on which the company can say, not seeking to set aside the contract, "We will hold you as passing this to the company, not because you

originally acquired it for the company, but because you entered into a contract to sell to the company which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it." I am of opinion that this cannot be maintained, and therefore the order we have to deal with cannot stand.

Still, I think we ought not to dispose of the case on that ground alone. We ought to consider whether these Appellants ought to be answerable for such profit, if any, as we can see they have made out of the concern. As I understand the transaction, it was this: They were the owners of the mine, the only owners, and they were originally the only members of the company. I say that because, although shares were allotted to some persons, yet as far as I can see they were simply nominees of some of the owners of the mine, and therefore were exactly in the same position as the owners of the mine. Then they, being entitled to the mine in certain proportions, which I will consider as so many £2 shares, in handing over the property of the company, represent their interest by a different denomination. For themselves having all the shares in the company, they choose to call their shares in the mine, as the property of the company, not 6000 shares of £2 each, but 18,000 shares of £2 each; of course each of those 18,000 shares is much less valuable than its nominal value. But they are the only members of the company, and they were the only owners of the mine. Therefore, I cannot see how the company can complain of that act which all the members of the company were cognizant of, and which, as far as they could, they approved of and confirmed.

If that is so, the whole case comes to an end. It may be that what was done was done for the purpose of enabling the company to be passed off on the market as something different from what it was. Whether that was so or not is, in my opinion, immaterial to the present question. But if it was so, the remedy is not an action by the company against those who were vendors and purchasers. The remedy is a remedy of each purchaser of shares, if there were any such, who was deceived by the representations made by his vendor as to the constitution of the company.

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In my opinion, not only can this order not be maintained, but even if there has been any profit made by the Appellants, we are not in a position at the suit and instance of the company in any way to make them account for it.

Solicitors: *Gregory, Rowcliffes, & Rawle*, agents for *Hodge, Hockin, & Marrack, Truro; A. D. Smith & Wood; Pattison, Wigg, & Co.*, agents for *Broomhead, Wightman, & Moore, Sheffield.*

C. A. 1880 — *March* 24.

In re BARROW-IN-FURNESS AND NORTHERN COUNTIES LAND AND INVESTMENT COMPANY.

Contributory—Paid-up Shares—Payment in Cash—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Y. agreed to sell land to *H.* and *W.* for £7713. *H.* and *W.* agreed to sell to the company for money payable by instalments. The company being short of money, it was arranged that *Y.* should accept £2000, part of the money, in fully paid-up shares. The land was accordingly conveyed by *Y.* to the company in consideration of £5713 in cash and £2000 in fully paid-up shares:—

Held (reversing the decision of *Little*, V.C.), that an arrangement between the company, *H.* and *W.*, and *Y.*, for paying £2000, part of the sum due from the company to *H.* and *W.*, by writing off a like amount of the sum due from *H.* and *W.* to *Y.*, was equivalent to a cash payment of £2000 by *Y.* to the company, and that the shares thus taken by *Y.* were to be treated as fully paid up, as in *Spargo's Case* (1) and *Ferrao's Case* (2).

ON the 14th of August, 1877, Mr. *J. S. Young* agreed in writing to sell to *Huddart, Ward,* and *Saunders* certain closes of land at *Grange*, in *Lancashire*, containing 51,425 square yards, for £7713 15*s.*

On the 30th of August, 1877, *Huddart, Ward,* and *Saunders* agreed with the promoter of the *Barrow-in-Furness and Northern Counties Land and Investment Company* to sell to the company, when formed, lands at *Grange* containing in the whole 86,940 square yards for £19,350, to be paid by such instalments as therein mentioned.

The company was registered early in September, 1877, with a nominal capital of £100,000, in 20,000 £5 shares, and by its

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 9 Ch. 355.

memorandum of association, dated the 3rd of September, one of its objects was stated to be the adopting and carrying out the above agreement of the 30th of August. The articles set out the agreement at length, and provided that the directors should adopt it and carry it into effect.

Shortly afterwards *Saunders* sold his interest in the lands comprised in the agreement of the 30th of August, 1877, to *Huddart* and *Ward*, and by an agreement dated the 19th of September, 1877, between the company and *Huddart* and *Ward*, the company adopted the agreement of the 30th of August with some modifications, the most important of which was that the purchase-money was reduced to £12,592 17*s.* 6*d.*

About June, 1878, the company took steps for carrying the purchase into effect, and an abstract of Mr. *Young's* title was delivered to the company. During the proceedings the following letters were written to Mr. *Young* by the solicitor of the company:—

"10 July, 1878.

"I have seen Mr. *Harrison* since my return and have told him your reason on account of ill health for declining to become a director of the company. Mr. *Harrison* says that himself and also his friend withdraw from their offer to become directors unless you take so much of the purchase-money in paid-up shares as I mentioned to you to-day. This will only now leave Mr. *Park*, and I am afraid it will throw cold water on it in his eyes. I will, however, see him first thing in the morning, and tell him your views and get him to write to you thereon. It is rather a pity the scheme should fall through for the want of £2000 in a matter of £12,000."

"11 July, 1878.

"I have seen Mr. *Park* this morning and fully explained to him your opinion, and he said as Mr. *Harrison* and his friend had withdrawn, unless you took up £2000 in fully paid-up shares in part payment of the purchase-money, he could not see his way to succeed in carrying out your wishes. I should be sorry if the matter should fall through, and I hope you will not allow it to do so on account of the £2000."

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The draft conveyance as originally prepared was between Mr. *Young's* mortgagees of the first part, himself of the second part, and the company of the third part. It recited that *Young* had some time since agreed with *Huddart* and *Ward* for the sale to them of the property for £7713, and that prior to the conveyance to *Huddart* and *Ward* they agreed with the company to assign and release to them the benefit of the contract, on payment by the company to *Young* of the purchase-money of £7713. The mortgagees and Mr. *Young* then purported to convey to the company in consideration of £2800 paid to the mortgagees and £4913 to Mr. *Young*. Mr. *Young* having agreed to take £2000 in fully paid-up shares, the draft was altered by inserting a recital to that effect, and expressing the conveyance to be in consideration of £2800 paid to the mortgagees, 400 fully paid-up shares allotted to Mr. *Young*, and £2913 paid to him. On the 3rd of October, 1878, the directors passed a resolution that 400 fully paid-up shares should be allotted to Mr. *Young* in part payment of his purchase-money. On the 28th of November, 1878, the deed was executed in the amended form and the purchase completed, Mr. *Young* receiving £2913 and the certificates for 400 fully paid-up shares.

Subsequently a doubt was felt whether the shares could be treated as fully paid up without a registered agreement. An agreement, dated the 29th of November, 1878, was accordingly prepared and sent to the Registrar of Joint Stock Companies for registration, but he declined to receive it as the shares had been already issued.

Mr. *Young* died in January, 1879, and the company being in course of winding-up, the names of his executors were put on the list of contributories. They applied to have their names removed, and the Vice-Chancellor of the County Palatine refused the application (1). The executors appealed.

(1) 1880. Feb. 18.

LITTLE, V.C., after stating the facts, continued:—

The 25th clause of the Act of 1867 enacts that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. Now, in the present case, there

Higgins, Q.C., and *W. E. M. Tomlinson*, for the Appellants:—

We are not bound to put the case so high as that the company was ever bound to pay cash to *Young*. If the company owes

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has been no contract in writing between the company and Mr. *Young* at any time registered which has purported to provide that the 400 shares shall be issued or allotted to Mr. *Young* otherwise than subject to the payment of the whole amount thereof in cash, and the shares must therefore be taken to have been issued to Mr. *Young* and now to be held by his executors in their executorial capacity, subject to the payment of the whole in cash, unless it can be shewn, as in *Spargo's Case* (Law Rep. 8 Ch. 407), and other cases which follow it, that such transactions have taken place between the company on the one side and Mr. *Young* or his executors on the other side as are one in law with or equivalent to payment by *Young* or his executors in respect of the shares, and would have supported the plea of payment in cash if that plea had been raised by way of defence by *Young* or his executors to an action by the company for calls on the shares. The argument of *Young's* executors substantially was that the execution of the conveyance and the issue of the shares were in effect simultaneous transactions, and that they involved a settlement by way of set-off of cross claims presently enforceable, one being a claim by Mr. *Young* for £2000 in cash as part of the purchase-money for the property conveyed by him to the company, and the other being, as it were, a supposititious claim by the company against Mr. *Young* for £2000 in cash as money due on the 400 shares, and that this settlement, by way of set-off, and this cross money claimed was equal to payment for the shares in cash. Now I think that *Spargo's Case*, and other cases of the same class, and I more especially refer to *White's Case* (12 Ch. D. 511), shew that in testing a case which is made on behalf of executors, what we have to do is first to look at what the agreement between the parties was, and then we must ascertain whether, on the 29th of November, when the conveyance was executed and the shares issued, there arose out of that agreement cross money payments presently enforceable which the argument of the executors assumes. Then, if we find that there were these cross money payments presently enforceable, we must next inquire whether what took place on that 29th of November amounts to proof that the parties had actually agreed to make that alleged set-off for which the executors contend. Now, with regard to what the agreement between the parties was, the truth of it depends upon the correspondence to which I referred: the proceedings of the directors on the 3rd of October, 1878, and the recitals of the conveyance itself. In my opinion, it is plain and manifest that the company never agreed to pay Mr. *Young* in cash the £2000, the set-off of which the argument of the executors assumes to form a money payment by Mr. *Young*. So far as this £2000 is concerned, the company agreed to issue to Mr. *Young* paid-up shares of the nominal value of £2000, and nothing else. There is no ground whatever for believing that these shares were of the full value of £2000 in cash or anything like it. In fact, the shares could not be floated upon the market, and up to the time of the winding-up no body of shareholders could be got together.

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money to *A.*, and *A.* owes money to *B.*, an arrangement among the three to treat the money as applied in payment up of *B.'s* shares is equivalent to payment in cash: *Ferrao's Case* (1); *Ex parte Bentley* (2).

North, Q.C., and *Neville, contrà* :—

The Vice-Chancellor, as we contend, rightly inferred from the letters that the company never assumed any liability to pay *Young* in cash. The agreement recited in the deed is to pay partly in cash and partly in shares. The case is similar to *White's Case* (3).

James, L.J.:—

I am of opinion that the order of the Vice-Chancellor cannot be affirmed. What took place amounted, in my judgment, to a good payment in cash. The substance of the transaction was this: There was not at the outset any agreement by *Young* to take shares. *Young* agreed to sell property for £7713 in cash, and this bargain was assigned by the purchasers to the company.

Then, again, it is quite clear that Mr. *Young* never intended to agree, and I think did not agree, to pay to the company cash for the shares. No doubt in law he did become liable to pay cash for the shares, but that was not by virtue of the agreement, but it was in spite of it, and it was by virtue of the section of the Act of Parliament, which raises not a contract liability, but a statutory liability, which was the creation of the Act of Parliament, and was not known to either of these contracting parties to exist on the 29th of November, but was believed by both of them not to exist. Moreover, it was not presently enforceable, because it was a liability which would have to be enforced by the making of calls, and calls have not been made on the 400 shares. But if they had been made according to the articles they would not be due until some few days after the calls. As to the alleged cross demands for payment in cash, the set-off of which the argument of the executors assumes to be identical with payment, one of them did not exist at all, and the other was not presently enforceable. Even if all the points I have referred to were otherwise, and were in favour of the contention of the executors, there remains the further objection that the suggested agreement of set-off is a mere fiction. There is not the slightest proof of it. There is no ground whatever for presuming it, and I think the supposition of it is irreconcilable with the whole tenor of the facts. Therefore the motion, under the circumstances, must be refused with costs.

(1) Law Rep. 9 Ch. 355.
(2) 12 Ch. D. 850.
(3) Ibid. 511.

Young was entitled to recover £7713 from his purchasers, the purchasers were entitled to call upon the company to pay that sum in order to enable them to complete their bargain with *Young*. Thus the purchasers owed £7713 to *Young*, and the company owed £7713 to them. The directors then say to *Young*, "It will be impossible for us to go on unless you will take £2000 of your purchase-money in shares." *Young* agrees to do so. There is nothing like the substitution of a new agreement, but a particular mode was adopted of fulfilling the old agreement which was still subsisting. The case is entirely within the principle of *Spargo's Case* (1), and is particularly within that illustration of it which is furnished by *Ferrao's Case* (2).

BRETT, L.J.:—

I am of opinion that the Vice-Chancellor came to a wrong conclusion; for, as it appears to me, the transaction was equivalent to this: Money due from the company was paid to *Young*, who was entitled to receive it, and he paid back to the company £2000, receiving shares in exchange. There is no case of novation; the company was bound to pay in cash to the persons who sold to them, and *Young* was entitled to receive the same cash from the persons to whom he sold. If all three parties had been present, the ceremony might have been gone through of the company handing the money to the purchasers and of the purchasers paying it to *Young*, and of *Young* handing it to the company for the shares. That the money was not actually so handed about, amounts, as was said in *Ferrao's Case*, to no more that the omission of an unnecessary form.

COTTON, L.J.:—

The question is whether these shares were paid for in cash, and in my opinion they were. *Young* agreed to sell his property for cash. The purchasers agreed to sell to the company for cash. Then, without making any new bargain, it was agreed that the company should satisfy part of the cash payment which they were to make to their vendors by crediting it to *Young* as payment up

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 9 Ch. 355.

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in full of the shares which he agreed to take. It is immaterial that he was not already the holder of the shares. There being a liability in the company to pay to their vendors in cash, and a liability in those vendors to pay *Young* in cash, the case comes within *Ferrao's Case* (1).

Solicitors: *Coburn & Young; Robins & Peters.*

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[1877 S. 161.]

Mortgage—Priority—Notice to Solicitors of Trustees—Verbal Notice to Trustees.

The Plaintiffs took a mortgage of a reversionary share in a testator's estate, and gave notice of the incumbrance to a firm of solicitors who were acting for the trustees and executors in a Chancery suit to which the testator had been a party, and were employed by them in all matters relating to the testator's estate in which professional assistance was required. The solicitors wrote accepting the notice on behalf of the trustees. A member of the firm deposed that at the close of a meeting held at his office two months afterwards, with reference to the winding-up of the Chancery suit, and lasting above three hours, the notice was read to the trustees. Two of the trustees positively denied this, and the third denied all recollection of it. There was no further proof of their having received notice of it until after notices of other incumbrances had been duly given to them:—

Held, by the Court of Appeal, reversing the decision of *Bacon*, V.C., that notice to the solicitors was not good notice to the trustees.

Held, further, that evidence of parol notice having been given to the trustees in the course of conversation at the end of a meeting called upon other business, could not be relied upon as fixing the trustees with notice in opposition to their denial of having received it.

Held, therefore, that the Plaintiffs must be postponed to the subsequent incumbrancers.

Held, that the solicitors in accepting service of the notice on behalf of the trustees were not guilty of a misrepresentation of fact for which they could be made liable, but were acting under an opinion common to both parties, but which was erroneous in point of law, that their employment as solicitors enabled them effectually to accept service of the notice.

THIS was an appeal by *Hardy* and *Cornell* the trustees of the will of *John Hardy* from a decision of Vice-Chancellor *Bacon* (2).

(1) Law Rep. 9 Ch. 355. (2) 10 Ch. D. 696.

To the facts there stated it may be added that Messrs. *Stevens & Bawtree* on receiving the notice of the Plaintiffs returned to the Plaintiffs' solicitor a duplicate of the notice with the following indorsement: "Received copy of the within notice on behalf of the trustees of the will of the within-named *John Hardy*, the 16th day of April, 1872. *Stevens & Bawtree*." *Stevens & Bawtree* were employed by the executors and trustees in all matters connected with the estate in which professional assistance was required, and at the time when the mortgage to the Plaintiffs was executed they were acting for them as such executors in a Chancery suit to which the testator had been a party, and were also receiving on behalf of the trustees and distributing among the persons entitled the interest on a considerable mortgage which formed part of the testator's estate, and which they had been employed as solicitors in effecting after the testator's death. It appeared that the meeting of the 4th of June, 1872, at which Mr. *Stevens* and his clerk Mr. *Cansdale* deposed that the notice was read to the trustees, had lasted three or four hours, and their evidence shewed that the notice was read at its close, apparently while the parties were at lunch. The notice was retained by *Stevens & Bawtree*, and no copy or note of it was given to any of the trustees. Both Mr. *Stevens* and his clerk stated that Mrs. *Hardy*, the widow, on hearing it made an observation to the effect that she was very sorry to hear of it, and was afraid it was only the commencement of evil days. *Hardy* and Mrs. *Hardy* positively denied having heard the notice read, and *Cornell* denied all recollection of it.

1880. April 13, 16. *Bristowe*, Q.C., and *Everitt*, for the Appellants:—

The main question is whether the trustees received notice of the Plaintiffs' charge at the meeting of the 4th of June, 1872. The notice was given by the Plaintiffs' solicitors to *Stevens & Bawtree* on the 16th of April, 1872, and they admit that it was not communicated to the trustees until that meeting. The burden of proof is on the Plaintiffs to prove notice, and they have not discharged that burden. There is no entry in the books of *Stevens & Bawtree* against the 4th of June, 1872, as to giving notice of this charge to the trustees. A verbal notice may be sufficient,

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but a casual notice in the course of conversation is not sufficient: *In re Tichener* (1). It must be shewn not only that the notice was read but read in such a way as to give the trustees an intelligent apprehension of the effect of it so that they were bound to remember it: *Lloyd* v. *Banks* (2). *Stevens & Bawtree* could not, without express authority, receive notices so as to bind the trustees: *Re Durand's Trusts* (3). They were in fact acting for the parties giving the notice, and did not give the trustees such a notice as would bind them within the principles laid down by Lord Chancellor *Cairns* in *Lloyd* v. *Banks*.

Sir *H. Jackson*, Q.C., and *Warmington*, for the Plaintiffs:—

The Plaintiffs are prior in point of time, and gave notice at once to the trustees' solicitors, who were proper parties to receive it: *Rickards* v. *Gledstanes* (4); *Boursot* v. *Savage* (5); *Tibbits* v. *George* (6); *Espin* v. *Pemberton* (7). If the solicitors should be held not authorized to receive notice they represented that they were, and are answerable for the damage which the Plaintiffs may sustain through the misrepresentations: *Slim* v. *Croucher* (8); *Spedding* v. *Nevell* (9); *Richardson* v. *Williamson* (10); *Godwin* v. *Francis* (11).

Hemming, Q.C., and *Bush*, for *Stevens & Bawtree*, were asked by the Court whether they would be satisfied if the bill was dismissed as against them without costs, and having replied that their clients would be satisfied with this, were not further called upon.

The other incumbrancers had been served with notice of the appeal, but did not appear.

JAMES, L.J.:—

In this case it is my misfortune to differ from the conclusion at which the Vice-Chancellor has arrived. In the first place, his Lordship appears to have been of opinion that the notice given on behalf of the Plaintiffs to Messrs. *Stevens & Bawtree*, who were

(1) 35 Beav. 317.
(2) Law Rep. 3 Ch. 488, 490–491.
(3) 8 W. R. 33.
(4) 3 Giff. 298; S. C. on appeal, 31 L. J. (Ch.) 142.
(5) Law Rep. 2 Eq. 134.
(6) 4 A. & E. 107.
(7) 3 De G. & J. 547, 554.
(8) 1 D. F. & J. 518.
(9) Law Rep. 4 C. P. 212.
(10) Ibid. 6 Q. B. 276.
(11) Ibid. 5 C. P. 295.

persons acting as solicitors for the executors and to some extent for the trustees, was in itself sufficient notice to create a priority and to make the trustees liable to the same consequences as if the notice had been given to them personally. That appears to me a startling proposition. It would be imposing a most tremendous burden upon trustees to say that merely because they have employed a solicitor in effecting an investment of the trust funds upon mortgage, they have made him their agent to receive any notices of subsequent incumbrances or dealings by the *cestuis que trust* of that trust fund. I cannot see any principle leading to such a conclusion. I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveyancing, scrivening, or conducting an action, but as an official solicitor, and that because the solicitor has been in the habit of acting for him, or been employed to do something for him, that solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such officer known to the law. A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, and the solicitor is his solicitor when he chooses to employ him and in the matter in which he is so employed. Beyond that the solicitorship does not extend, and a man is not an agent for the purpose of receiving notice of an incumbrance created by a *cestui que trust* because he was the solicitor employed to invest the moneys, or even because afterwards he, for convenience, received from the mortgagor the interest and handed it by direction of the trustees to the different persons entitled to receive it.

No doubt there are cases in bankruptcy in which it was held that notice to a person acting as solicitor was sufficient to take a *chose in action*, out of the order and disposition of the assignor. Whether I should have decided those cases originally as they were decided, I will not undertake to say, but it seems to me that the question what is sufficient notice to prevent a thing from being alleged to be in the order and disposition of an apparent owner

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with the consent of the true owner, stands upon a very different footing from the question what is sufficient notice as regards successive incumbrancers. The Courts have a great inclination to prevent a man's losing his property through the fiction that somebody else has been giving credit to the bankrupt on the supposition that it was his, which one knows is not the fact in one case out of a hundred. But we have to consider whether notice to a solicitor is notice to the trustees in a case where the most serious consequences might accrue to the trustees. Suppose there was nothing but the notice to the solicitors and the acceptance by the solicitors, and then the trustees, in perfect ignorance of the fact that any such notice had been given, being asked by somebody whether they had received notice of any incumbrance, answered that they had not, are the trustees to be told, "Though you did not receive notice, persons acting as your solicitors did, and you are answerable for all the consequences of your not stating the fact that notice had been received?" That would be a very serious burden to impose upon trustees, and I am not prepared to do it. When a man has applied to the trustees, who are the proper persons to receive notices and to give information, is he to lose the benefit of his inquiry and of the true information he has received in answer to that inquiry, because somebody has given notice to solicitors who have previously been employed in some way about the trust property? I am of opinion that that result cannot be the proper legal result and is not the law. I am prepared, therefore, to say that before a notice of this kind of a charge upon the property can be of the slightest validity it must be given, if given to a solicitor, to a solicitor who is actually, either expressly or impliedly, authorized as agent to receive such notices, and I am of opinion that in this case the solicitors were not so authorized.

Then we come to the second part of the case, whether, as a matter of fact, the solicitors gave actual information to the trustees of the notice which they had received. It is said that we cannot come to a different conclusion upon that matter of fact without coming to the conclusion that Mr. *Stevens* and Mr. *Cansdale* were guilty of perjury. It is not necessary for us to come to any conclusion as to the extent to which their memory is inaccurate, or whether they have accurately stated everything

that took place. We have to consider this—was there a communication made to the trustees in such a way as to give them an intelligent apprehension of the fact that they had received a notice which would make it untrue in them to say to anybody else that they had not received that notice? First of all we have this fact—that the notice was received by the solicitors in writing. They received it and accepted it. According to their own account they for more than two months never communicated it to the trustees. They never wrote and told them that they had received this notice, and during the whole of those two months those trustees would be in the same difficulty in which they are said to be now. If during those two months anybody had asked them, "Have you received notice," they would have said "No." During that time they were left without any information, and the mode in which information is said to have been at last given to them is this, that a meeting was summoned with no reference whatever to any dealing or transaction by the *cestuis que trust* in regard to their beneficial interests—a meeting not really of the trustees as such, but of the executors of the will for the purpose of winding up an outstanding Chancery suit against the testator's estate—and that then the notice was given to them. The meeting had lasted several hours, and while the parties were sitting at luncheon Mr. *Stevens* said that he had received the notice. The trustees say that nothing was communicated to them that left any impression on their minds, they remember nothing about it; it was simply a notice during a conversation with the mother of the gentleman charging the estate, and Mr. *Stevens* and his clerk depose that she said, "I am afraid he is getting into bad courses," or "This is the beginning of evil days." That was a conversation which really was not *ad rem*, it had nothing to do with the business which was then before them. Taken at the utmost, it was a casual conversation of which no minute was made at the time. It was not said, "Take this with you," or "Take care to have a note of it so that you may protect yourselves against any mistake, and if anybody asks you whether you have received notice, recollect that there is this notice which ought to prevent your doing anything further." Something of that kind ought to have been done. There ought to be something more than a casual mention,

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at the close of the transaction of other business occupying hours and followed by a luncheon, of a fact shewing what the young man was doing. What is said to have been done was not calculated, in the language of Lord *Cairns*, to give an intelligent apprehension of the fact that there had been that kind of notice given to the trustees which they were bound to take as part of the materials in their possession to regulate their course of proceeding in dealing with the trust fund.

Under these circumstances, I am of opinion that the Plaintiffs have not made out their case that there was any such notice given to the trustees as to make the trustees liable, or to deprive those persons of their rights who applied to the trustees, and received answers from the trustees according to the best of their knowledge, remembrance, and belief of what had occurred. That disposes of the case except as regards the personal claim against Messrs. *Stevens & Bawtree.*

Now, with regard to this personal claim, it appears to me that in order to make out any claim against them the Plaintiffs were bound to make out this—that Messrs. *Stevens & Bawtree* represented to the Plaintiffs that they were duly authorized as the agents of the trustees to receive notice from the Plaintiffs on behalf of the trustees. That is the substance of the allegation in paragraph 9a, which must be made out by the evidence before there can be any case established against them to make them personally liable. I am satisfied that there was no representation made by Messrs. *Stevens & Bawtree* of anything as a matter of fact that was untrue. I am satisfied that the solicitors for the Plaintiffs and Messrs. *Stevens & Bawtree* both of them laboured under the notion, which has been argued in this case as a matter of law, and to some extent warranted by what the Vice-Chancellor said, that from the mere fact that Messrs. *Stevens & Bawtree* were the solicitors of the trustees and executors in the matter of the executorship and the matter of the investment, notice to them was notice to the trustees. The Plaintiffs' solicitors thought so, the Defendants Messrs. *Stevens & Bawtree* thought so, and all the communications that passed between them were evidently based upon that common misapprehension of the law which I trust will after to-day not be so commonly entertained, namely, that the mere

fact that they were solicitors, which they represented that they were, was sufficient to make the notice a good notice. The Plaintiffs gave it under that misapprehension, and Messrs. *Stevens & Bawtree* received it under that misapprehension as to the state of the law, and there was nothing whatever amounting to a representation of anything as a fact which was not perfectly true, that is to say, they were the solicitors of the executors, and they accepted notice as it was sent to them. The blunder I suppose originally began with the society and the society's agents in assuming that the notice to the solicitors was sufficient notice. I am of opinion, therefore, that that part of the case also fails, but as Messrs. *Stevens & Bawtree*, to a certain extent, were parties to the misunderstanding, it appears to their Lordships, and to me, that the bill, although dismissed against Messrs. *Stevens & Bawtree*, ought to be dismissed against them without costs.

BAGGALLAY, L.J.:—

Agreeing in what the Lord Justice has said, I have very little to add. It is contended by the Plaintiffs, first, that the notice of the 16th of April, 1872, received by Messrs. *Stevens & Bawtree*, was a sufficient notice to the trustees to give the Plaintiffs a right to priority. It has been secondly contended that if that was not itself sufficient notice the terms of the notice were in fact communicated by Messrs. *Stevens & Bawtree* to the trustees upon the occasion of the meeting in the early part of June in the same year.

As regards the first contention, there is no doubt that the notice that was served was a notice addressed to the trustees, and that Messrs. *Stevens & Bawtree* returned one copy of that notice with an indorsement that they had received a copy of the within notice on behalf of the trustees. As was pointed out by the Lord Justice *James*, I think that no doubt both Messrs. *Stevens & Bawtree* and the solicitor of the Plaintiffs were under the impression that a notice addressed to the trustees and delivered to Messrs. *Stevens & Bawtree* would be a sufficient notice. I agree that this was an erroneous impression, and that they were not in a position to accept a notice on behalf of the trustees.

Then, as far as regards the second contention, I would first of

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all say that the burden of proof lies on those who assert that the communication was made. Now, it is stated that at the time when the notice was received from the Plaintiffs' solicitor, a note was made that it was to be communicated at some time or other to the trustees. A note appears to have been made to that effect, but there is no entry in the books of Messrs. *Stevens & Bawtree* shewing that that communication was ever made. Then we have the positive denial of each of the trustees that any such communication was made. It is represented to have been made at the close of a long meeting of some three hours' duration when the parties were assembled for another purpose, and again in the entry of the business which was transacted upon that occasion there is no reference made to any such information as is stated to have been made. I am bound, therefore, to say that giving the best attention I can to the evidence on this part of the case, and the statements that have been made, together with the documentary evidence on the subject, the fact that the communication was made has not been proved. I think, therefore, that the appeal must be allowed.

BRAMWELL, L.J. :—

This case is one of a class with which I am not familiar, and if I had to choose between my own opinion and that of the learned and experienced Judge whose decision is appealed from, I should undoubtedly prefer his. As it is, knowing that his opinion is not shared by my brethren here, I feel at liberty to exercise my own judgment, and I am desirous of expressing my opinion upon the case, because I come to consider it with a mind that may be said not to be hardened or sophisticated by familiarity with cases of constructive notice. Coming in that primitive condition to the consideration of this case, I do not hesitate to say that in my opinion if this decree were maintained it would inflict cruel injustice on the trustees.

The facts of the case are that a notice of the Plaintiffs' incumbrance was given to Messrs. *Stevens & Bawtree*, and that Messrs. *Stevens & Bawtree* were, as they truly said, solicitors for the trustees, that is to say, when the trustees had any business which required solicitors Messrs. *Stevens & Bawtree* were the gentlemen they had gone to. Messrs. *Stevens & Bawtree*, therefore, when

asked whether they were concerned for the trustees, might well say, as they did, that they were the solicitors of the trustees. That is an expression accurate enough, just as a man might say so-and-so is my medical attendant, or so-and-so is my tailor. That would not indicate that he was under medical treatment at the time, or was having some garment prepared for him at the moment, but that those were the persons whom he usually employed in relation to the matter spoken of. So Messrs. *Stevens & Bawtree* might truly answer, we are solicitors for the trustees, meaning to say, "When the trustees have had legal business to do they came to us, and when they have legal business in the future no doubt they will come to us again." But it is not shewn that the trustees ever in any way directly or indirectly said to these gentlemen, "Any notice which ought to be served upon us we authorize you to receive instead of our receiving it ourselves, and undertake it shall be as binding if given to you as to us."

Under the circumstances, the relationship between the two parties being that which I have described, I am at a loss to see what possible reason or authority there is for saying that a notice to these gentlemen, who have been and probably in any future business would be solicitors for the trustees, would be notice to the trustees. As Lord Justice *James* has said, there is no such thing as a standing relation of a solicitor to a man. A solicitor does not stand in a permanent relation to his client as a chaplain does to a nobleman or body having a chaplain. A man is a solicitor for another only when that other has occasion to employ him as such. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required; but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes. I put during the argument this illustration. Suppose the Plaintiffs, knowing or making sure that Messrs. *Stevens & Bawtree* had been employed by the Plaintiffs, had without any inquiry of *Stevens & Bawtree* given the notice to them, would there have been a duty on the part of *Stevens & Bawtree* to communicate it to the trustees? Sir *Henry Jackson* was compelled to say that there would not be, and I am at a loss to see how there would be. If it was their duty, they would have to be

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paid for it. By whom? By the trustees? Why? Why should any trustee be made liable to a charge from his solicitor merely because an intending incumbrancer or an incumbrancer thought fit to give notice to the solicitors instead of the trustee? If this notice had been given to Messrs. *Stevens & Bawtree* without further inquiry, I cannot see that they would be under any obligation to communicate it to the trustees or to tell the Plaintiffs whether they had or had not done so. If that is so, it is manifest to my mind that there is no such relation as to make notice to the one notice to the other.

Now as to the authorities, I will say very little about them except to make an observation on the cases as to reputed ownership. The doctrine of reputed ownership has not of late years been a favourite one with Courts of Justice, and they have held that there was no reputed ownership of a debt by the consent of the true owner if the debtor had notice of the assignment of the debt. Why notice to one individual, although he was the debtor, should have taken it out of the doctrine of reputed ownership, is not clear to my mind, but it is partly attributable to the desire of the Court to get rid of the harsh consequences of the enactment as to reputed ownership. When once the Courts had taken that view they thought, I suppose, that they might take a further step, and say that when the debtor's solicitor was engaged in his business as solicitor, and that brought him in connection with the transaction, notice to him would be as efficacious as notice to the debtor for the purpose of taking it out of the reputed ownership of the creditor. I participate in the doubt indicated by Lord Justice *James* as to whether if those cases came before us untouched by authority we should decide them as they were decided. I cannot understand therefore, I own, upon what possible ground it could be righteously held that these trustees were affected with notice because the incumbrancer thought fit to give it to persons who were solicitors in the sense in which these gentlemen were. I desire in using these expressions to speak with great respect of the learned Judge of the Court below, but I state the way in which it strikes my mind, which, as I say, has not been hardened, or not instructed or perverted by the consideration of questions of this sort.

Then it is said that whether *Stevens & Bawtree* were authorized to receive this notice or not, so as to bind the trustees, at all events they communicated it to the trustees. If they did so in such a business-like way that the trustees were bound to remember it, no doubt the notice would be effectual; but, as the Lord Justice *Baggallay* has said, the burden of proof is upon the Plaintiffs. It is, I admit, impossible not to see the force of the argument that the learned Judge below saw the witnesses *Stevens* and *Cansdale* on the one hand and the three trustees on the other, and was satisfied with the evidence of *Stevens* and *Cansdale*, and adopted their statement. There is also another cogent consideration in favour of the Plaintiffs. The affirmative is sworn to by *Stevens* and *Cansdale* with circumstances. It is not a general statement merely of what took place, but they swear in some detail how it took place, and how the information was given, and they swear to the statement made by Mrs. *Hardy* that it was the beginning of trouble. It certainly may be said, therefore, that what they say cannot be untrue except they have invented it, whereas the statement of the three trustees may have its origin in nothing worse than this—that they do not remember it. Undoubtedly over and over again when one has had to leave a case of that description to a jury, it has been pointed out that, as a matter of common charity, you ought rather to suppose that one set of witnesses have forgotten what took place than that the others have wilfully and fraudulently invented a story. That is a consideration that struck me in this case, as well as the fact that the witnesses were seen by the Vice-Chancellor. But we cannot let those be all-powerful considerations. If it were to be laid down as a rule that affirmative evidence is always to be believed because the denial of it may arise from defect of memory, it would be like a good many other golden rules, very mischievous in its application. I cannot in this case adopt the view taken by the learned Vice-Chancellor, because there are some circumstances to my mind of very great suspicion in this case. [His Lordship then, after observing that the notice was not forwarded, as it ought to have been, to the trustees, entered into an examination of the evidence as to what passed at the meeting of the 4th of June, 1872, and as to the communication with Mrs. *Hardy* in 1876, and

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stated his reasons for coming to the conclusion that no such mention of the notice had been made at the meeting as conveyed to the minds of the hearers that it was anything of importance for them to remember, or conveyed to them an intelligent apprehension of it.] I am not satisfied that any notice was given to the trustees of the Plaintiffs' incumbrance of such a character as that it would lead them as prudent people to make it a part of their knowledge as a thing by which they were to govern their conduct in the future. It is really shocking to think that mere talk, something that merits scarcely a better name than gossip or chatter, should have the effect of making these trustees liable to pay the claim of the Plaintiffs. I think, whether we look at the attempt to fix them by the notice to the solicitors as such, or the attempt to fix them by shewing that they had communicated to them that which the solicitors knew, I think in either the one case or the other it would be a grievous hardship upon them to hold that they were bound.

Then, as regards the question whether Messrs. *Stevens & Bawtree* should be held liable, the only ground on which it is sought to make them liable is misrepresentation. In Courts of Common Law we were not in the habit of holding people liable for a misrepresentation unless it was a dishonest and fraudulent one. Here, in my opinion, there has been no misrepresentation of a fact, but there has been a common mistake. The letter sent to Messrs. *Stevens & Co.*, coupled with their answer, really shews what they meant. It is this: "Dear Sir, I am referred to you by *F. C. Hardy* for an extract from a will. You are, I believe, concerned for the trustees, and I shall be obliged by your stating" so and so. Then the answer is, "We are solicitors for the trustees," and after this they accept service on behalf of the trustees. There is no misrepresentation of any fact, but a common mistake, both parties supposing that because *Stevens & Bawtree* were concerned for the trustees they had authority to receive notice on their behalf, or rather that notice given to them would be as effectual as notice given to the trustees, which was a mistake in point of law.

JAMES, L.J.:—

I may add this by way of summing up what has been said by

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the Lords Justices. To my mind it is too dangerous to allow a notice with the consequences of it to be proved by something mentioned in the course of a conversation at a meeting on other business, which may have been heard and attended to by one, and not heard or attended to by the others, of the parties present.

Some discussion then took place as to the proper form of the order, having regard to the fact that none of the incumbrancers other than the Plaintiffs had appealed, or appeared on the hearing of the appeal. The Court determined that this fact ought not to prevent the putting the decree in the form in which it ought to be in pursuance of the decision that the Plaintiffs had not given notice. The action accordingly, except so far as it related to the real estate, was dismissed without costs as against *Stevens & Bawtree*, and with costs as against all the other Defendants, the fund being still reversionary, so that payment according to priorities could not be ordered.

Solicitors: *Andrew & Wood; Clapham & Fitch; Beaumont & Warren.*

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April 28.

Practice—Married Woman—Next Friend—Security for Costs—Rules of Court, 1875, *Order* XVI., *r.* 8.

The old rule in Chancery that an application that a next friend should give security for costs must be made before the next material step in the cause is taken, and the old rule at Common Law that the like application must be made before issue joined, are abrogated by the new Judicature Rules; and under Rules of Court, 1875, Order XVI., rule 8, the Court has a judicial discretion to direct security for costs to be given at any time.

THIS was an appeal from the decision of Vice-Chancellor *Bacon*.

The Plaintiff, a married woman and the tenant for life under a settlement, sued by a next friend the surviving trustee of the settlement and the executors of a deceased trustee, claiming an account of the trust funds and the appointment of a receiver.

Notice of motion for a receiver was served with the writ, and the Defendants consented to the appointment of a receiver. They

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also without opposition allowed an order to be made against them for discovery of documents, and had also made several applications for time to deliver their statement of defence and to file their answers to Plaintiff's interrogatories. Nearly two months after the date of the writ the Defendants the executors took out a summons that the next friend should give security for costs, alleging that they had then for the first time ascertained that the next friend was a domestic servant or companion of the Plaintiff and was without any means.

The Vice-Chancellor being of opinion that the application was governed by the old practice in Chancery, dismissed it on the ground that, having regard to the orders appointing a receiver and for discovery, and the material steps taken in the action by the applicants since the statement of claim was delivered, they had waived their right to security for costs.

The Defendants the executors appealed.

Hemming, Q.C., and *J. B. Porter*, for the Appellants:—

The Vice-Chancellor was of opinion that on the merits we were entitled to security, but dismissed our application on technical grounds. No doubt the right to security for costs is lost by laches: *Daniell's* Ch. Pr. (1); but there has been no such laches on our part as to preclude our right to relief. We applied the instant we ascertained the true position of the next friend. In *Swanzy* v. *Swanzy* (2) it was held that the Defendant had not lost his right to security for costs although he had applied for time to put in his answer.

[JESSEL, M.R.:—You did consent to a material step in the cause, the appointment of a receiver. Was not that a waiver of your right?]

We submit it was not. The notice of motion for a receiver was served with the writ, and before we could possibly get any information of the position of the next friend. Our application was made promptly after we discovered the *status* of the next friend, and the Plaintiff is not injured by anything we have done.

[JESSEL, M.R.:—It appears to me that the new Rules have

(1) 5th Ed. p. 31. (2) 4 K. & J. 237.

superseded the old practice, and that the application is within Order XVI., rule 8. In *Nowell* v. *Nowell* (1) I directed a married woman to defend separately without a next friend and without giving security for costs.]

Then we submit the rule is discretionary, and we ask the Court to exercise that discretion in our favour.

T. A. Roberts (Sir *H. Jackson*, Q.C., with him), for the Respondent:—

The right to security for costs has been waived by the steps that have been taken. Further, it is not a case for security for costs, because it is a claim for an account of the trust funds which the Defendants have received, and by consenting to the appointment of a receiver they have admitted that there are trust funds, and that our claim is *bonâ fide*. The other trustee, who is also a Defendant, admits having £1500 of trust funds in his hand. That is ample security to the Appellants for their costs.

JESSEL, M.R.:—

I think the justice of the case will be met by discharging the order of the Court below, and directing the writ to be amended by striking out the name of the next friend and leaving the Plaintiff to sue alone. The costs here and below to be costs in the cause.

I am satisfied that under the new Rules the Judge has a complete judicial discretion, quite unfettered by the old rule in Chancery, to allow a married woman to sue alone or by a next friend, and either with or without giving security for costs; and that the discretion as to time is unlimited by the new Rules; and that the old rule of the Court of Chancery, that the application for security must be before any step taken, and also the old rule at Common Law, that the application must be made before issue joined, are abrogated by the new Rules.

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Solicitors: *Hyne-Haycock & Bridgman; J. E. S. King.*

(1) 13 Ch. D. 510.

C. A.
1879
V.-C. B.
Nov. 18.
C. A.
1880
June 7.

In re CLARK'S ESTATE.
MADDICK *v.* MARKS.

[1879 C. 10.]

Wills Act, s. 27—*Settlement—Power of Appointment—General Bequest by Will of subsequent Date—Contrary Intention—Codicil explaining Will.*

By voluntary deed *A.* settled property including £1000 due to him from his son-in-law *B.*—such sum to be allowed to remain owing during *A.*'s life-time, but not after his death, except on the terms of obtaining security by the assignment of a policy upon *B.*'s life—upon such trusts as *A.* should by will or deed appoint, and, in default of appointment, on trust to pay the interest to *A.* for life, and after his death on trusts for his daughters and their children, under which the interests of daughters ceased on their death without issue.

By a subsequent will *A.* bequeathed his residuary estate on trusts for his daughters and their children, under which daughters dying without issue had power by will to appoint their shares.

By a codicil, after reciting that he had advanced to *B.* other sums besides the £1000, and that under the settlement and under the will, or one of them, his daughter, *B.*'s wife, would be entitled for her life, and their children would be entitled in remainder to a certain share in the property comprised in the settlement, *A.* declared that such share under the settlement or will, or either of them, should be taken to be satisfied out of the moneys owing to him by *B.* other than the £1000. On the day following the execution of this codicil, *B.* assigned to *A.* a policy of assurance on his life as security for £2000 then owing by him to *A.*:—

Held (affirming the decision of *Bacon*, V.C.), that no contrary intention had been shewn within the meaning of the *Wills Act*, s. 27; and, accordingly, that the residuary gift in the will was an execution of the general power reserved by the settlement.

Held, also, that the execution of the assignment of the policy was not one of the surrounding circumstances which could be looked at for the purpose of ascertaining the testator's intention.

Whether a codicil can be read with a will for the purpose of ascertaining the intention of the testator in the will—*quære.*

In ascertaining whether a testator has shewn an intention not to execute a general power of appointment by a residuary gift, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger.

Observations on *Moss* v. *Harter* (1) and Lord *St. Leonards*' comments upon it (2).

IN 1866, *George Clark*, the testator, advanced to his son-in-law, *J. L. Denman*, for the purpose of assisting him in his business of a

(1) 2 Sm. & Giff. 458. (2) Sugden on Powers, 8th Ed. p. 306.

wine merchant, the sum of £1000, repayment of which sum and interest was secured by an agreement of May, 1866, by which *Denman* agreed, when required by *Clark*, to execute to him a bill of sale.

By an indenture of the 20th of June, 1866, *Clark* assigned to *F. Nalder* and *William Bird* the debt of £1000 and interest, and also certain stocks and securities specified in a schedule to the indenture, upon trust to allow the £1000 to remain during the life and at the direction of *Clark*, on the security of the agreement of May, 1866, or, when directed by *Clark*, enforce performance of the agreement or call in the said sum and interest, and, when directed by *Clark*, require and obtain from *Denman* a satisfactory policy of assurance for securing the sum of £1000. And after the death of *Clark*, in case the £1000 should not have been called in and received by the trustees, the trustees were at their discretion either to permit the same to remain in the hands of *Denman* during the remainder of his lifetime, or call in and receive the same; but the trustees were not to permit the £1000 to remain in *Denman's* hands after the death of *Clark*, except on the terms of requiring and obtaining an assignment by way of mortgage of such policy of assurance. With respect to the stocks and securities thereby assigned, and the sum of £1000 when received, the trustees were directed to stand possessed of the same, and the income thereof, upon such trusts, and subject to such powers, provisoes, agreements, and declarations, as the testator should by will or deed appoint, and, in default of such appointment, upon trust to pay the income thereof to the testator during his life, and after his decease, as to the stocks, shares, and securities specified in the schedules, upon trusts for the benefit of the testator's three daughters and their issue. And with respect to the £1000, from and after the death of the testator, upon similar trusts for the benefit of his three daughters and their respective children (under which trusts the interests of his daughters in the settlement funds were to go over to the surviving daughters on their death without issue).

This settlement was voluntary, and the trustees after executing it having declined to act any further in the matter, the stock and shares were not transferred into their names, nor had any part of the £1000 debt been received by them.

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By his will, dated the 29th of September, 1871, *George Clark* bequeathed the residue of his estate unto *James Hodge* and *J. L. Denman*, upon trust to convert and invest the same as therein mentioned, and to pay the income unto and equally between his three daughters during their joint lives, and after the death of each of his daughters, to pay one equal third part of the residuary estate unto and equally between the issue of each daughter so dying and living at her decease on attaining twenty-one, and if more than one, with benefit of survivorship. And in case of his daughters, or either of them, dying unmarried, or without leaving issue her surviving, upon trust to pay the share of each such daughter to such person or persons as she might by deed or will appoint. And in default of such appointment, upon trust to pay the same unto the survivors or survivor of his daughters, but under the same conditions and provisoes as thereinbefore ordained in respect of their or her original shares or share.

By a codicil to his will, dated the 30th of December, 1873, after reciting that he had at various times lent and advanced to *J. L. Denman* various sums of money other than and beyond the £1000 mentioned in the settlement of June, 1866, and reciting as follows: "Whereas under and by virtue of the settlement of 1866, and under and by virtue of my said will or one of them my daughter Mrs. *Denman* will, after my death, be entitled for her life, and the children of Mr. and Mrs. *Denman* will be entitled in remainder to a certain share or shares of and in the stocks or funds comprised in such settlement, and of and in all other my estate and effects," he, the testator, directed that the share or shares of Mrs. *Denman* and of her children under the settlement and will, or either of them, should be deemed and taken to be satisfied, either entirely or *pro tanto*, by and out of the moneys which at the time of his death might be owing to him from *J. L. Denman* (other than the sum of £1000), and that his executors should stand possessed of the securities for such moneys in trust for Mrs. *Denman* and her children. And the testator desired his executors to allow to *J. L. Denman* such time as he might require for the repayment of the moneys so owing to the testator, he only paying interest for the same in the meanwhile at the agreed rate. By this codicil the Defendant *Marks* was appointed an executor jointly with *Hodge* and *Denman*.

By an indenture of the 31st of December, 1873, the following day to that on which the codicil was executed, *J. L. Denman*, who had since the date of the settlement of 1866 borrowed from the testator further sums amounting to £1000, assigned a policy of assurance on his life for £1000 to the testator, as a security for the repayment of the £2000 then owing from him, subject to the right of the trustees of the settlement of 1866, and subject to a proviso for redemption on payment of the £1000 secured by the policy and interest.

The testator died on the 19th of March, 1875.

Georgina Charlotte Clark, one of his three daughters, died in 1878 unmarried, having by her will, dated the 13th of March, 1875, appointed the Plaintiff her executor and bequeathed to his father all the moneys inherited from the testator, her father.

J. L. Denman died in December, 1877, and after his death the sum of £1000 assured by the policy, together with certain bonuses thereon, was paid to the Defendant (as surviving executor of the testator) in satisfaction of the debt of £1000 and arrears of interest thereon.

The question raised by the action was whether the will and codicil of the testator, *G. Clark*, operated as an execution of the power of appointment contained in the settlement of 1866, so that the funds settled by that deed passed under the residuary bequest in the will, the Plaintiff, as the executor of *Georgina Charlotte Clark*, being interested in maintaining the affirmative, as under the trusts of the settlement the shares of daughters dying without issue went over to their surviving sisters, while under the will the daughters dying without issue had power to appoint their shares by deed or will.

The action was tried before Vice-Chancellor *Bacon* on the 18th of November, 1879.

Hemming, Q.C., and *Popham*, for the Plaintiff:—

The residuary gift operated, under the *Wills Act*, s. 27, to pass the settled property subject to the general power, and can only fail to do so if a contrary intention can be shewn. There is no contrary intention within the meaning of sect. 27, unless you find something in the will inconsistent with the view that the general

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devise was meant as an execution of the power. Something must be shewn which can fairly be described as inconsistent with that intention: *Scriven* v. *Sandom* (1).

Sir *H. Jackson*, Q.C., and *Levett*, for the Defendant:—

The plainest conceivable contrary intention has been expressed by this testator—plain on the grammatical construction of the words he has used, plain on principle, and plain on authority. The will and codicil must be read together, and the codicil, so far as it varies or is inconsistent with the will, will be the governing instrument, and will operate either as a revocation of the will or as controlling it, or by way of explanation. Having regard to the reference to the settlement in the codicil, and also to the identity of the provisions in the settlement and the codicil as to not calling in the first and second sums of £1000, the effect of the will and codicil when read together is not only not to execute, but to shew plainly that the testator did not intend to execute, the power contained in the settlement by the general residuary gift. Where the property is settled by the testator in default of any appointment by himself, some indication is required of an intention by him to defeat his settlement in order to hold a general gift in his will which can be satisfied by other property to be an execution of his power: *Sugden* on Powers (2); *Moss* v. *Harter* (3). In this case the codicil contains the clearest possible recognition of the settlement as existing and in force, and the Court in construing the instruments has power to consider the surrounding circumstances, so as not, by holding that a general residuary bequest must in all cases operate as an execution of a power, to defeat the testator's deliberate intention to keep alive the trusts of the settlement: *In re Ruding's Settlement* (4).

BACON, V.C.:—

I have listened, of course with great respect, to the authorities which have been referred to on behalf of the Defendant, and I have not a word to say against any of them, or the comments of Lord *St. Leonards* upon them, but one does see, not without a

(1) 2 J. & H. 743.
(2) 8th Ed. p. 306.
(3) 2 Sm. & Giff. 458.
(4) Law Rep. 14 Eq. 266.

certain mistrust, the evident inclination to nibble at this clause in the *Wills Act* (sect. 27), and to try it by a test more severe than —having regard to the general provisions of the *Wills Act*—I think it ought to be exposed to. I have nothing to say to that. The decisions are, I consider, all perfectly binding. I do not say binding upon me in the strictest sense, but they guide me, and I should not think of deciding anything in opposition to them as the matter stands. I agree also that in considering these cases, and particularly in construing those words in the statute, "unless a contrary intention shall appear," it is necessary and just that the surrounding circumstances should be considered. If the surrounding circumstances lead to a conclusion one way or the other, it is a great help, in construing the Act, to take those circumstances into consideration. Looking at the surrounding circumstances here, what are they? A man at a certain time of his life makes a settlement upon his children. That is the object of the first instrument. The scheduled property and the £1000 due from *Denman* were the subjects of that settlement. But this testator in the first place says, "Although I settle this to prevent accidents hereafter, I reserve to myself the full power of dealing with the fund." That is the plain meaning of it. Then at a later time he comes to make his will, and if he knew—as in my position I am bound to assume that he did know—that unless he declared a contrary intention by his will he must have intended that the will then made should be an exercise of the power then contained in the settlement, he purposely omits all mention of the settlement, but in plain words, and consistently with the surrounding circumstances, he makes a disposition (which is an exercise of the power varying the limitations in a not unimportant point) of that which was in the settlement, and which he had power to dispose of.

So the matter stands as far as we have got, and nobody can say that there is any contrary intention either to be derived from any words contained in the will, or to be inferred or concluded from any of the circumstances which surrounded the testator and settlor when he was providing for the members of his family. Then comes the codicil, and that is said to declare a contrary intention, or rather it is put that the terms of that codicil coupled

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with the consideration of the surrounding circumstances amount to an expression of a contrary intention. I can find no ground for that contention. The object of the codicil is only to take care that when the division amongst his children shall take place, which by his will he had authorized and directed, the debt due from *Denman* shall be taken by *Denman's* wife and children as a part satisfaction of the share which they would take. That is the sole purpose and object of the codicil; it has no other intention either expressed in or to be inferred from it. It is true that it says in terms—and that has been the argument addressed to me—"whereas my daughter will be entitled under the settlement and the will or one of them,"—and therefore it has been inferred that it was the intention of the testator to treat the settlement as a separate substantive thing, and the will as another and different thing. Unless I were to twist and torture the words I could come to no such conclusion—they are exactly the words which a man not versed in the art of making wills would use. "One way or other—either by the settlement which I now exercise a power over, or by the will over which I have unquestionable power, my children are provided for. Somehow or other that object is attained. I take care that as to that further debt which *Denman* owes me—other than that which is contained in the settlement—they shall take that debt as satisfaction of a portion of that to which they would be entitled under the settlement and will."

So far from finding any contrary intention, I find one persistent, distinct intention on the part of the testator—distinct when he executes the settlement and reserves the power in his own hands of dealing with it as he may think fit; perfectly distinct when he makes his will, when he gives everything he has or has power over, in the manner described in the will, and not controverted or altered in the slightest degree by the provision which he makes in the codicil—no doubt for the purpose of making an equal division amongst his children. *Denman* had had a good deal of money from him at various times, and the testator did not mean that the shares of his other children should be diminished by any failure in the payment of that debt which *Denman* owed to his estate. That, I am asked to conclude, shews a contrary intention. I am

very far from thinking that I ought to infer that, having regard to the cases which have been cited—none of which are inconsistent—certainly not that before Vice-Chancellor *Malins* (*In re Ruding's Settlement* (1)), where he was asked to say that there was a contrary intention because, by the will (made before the settlement), the gift being absolute was inconsistent with the gift in the settlement. Instead of being surprised that the Vice-Chancellor decided it as he did, I am only surprised that there should be so much hesitation as I find expressed in the case referred to, and that the matter should be considered as difficult as the expressions of the Judges dealing with it suggest. Nice it is, I admit; delicate it may be; difficult I cannot say that I feel it to be. I am, therefore, of opinion that the will was a valid exercise of the power of appointment contained in the settlement, and must have its effect as a will, and that that is not in the slightest degree impaired by the terms of the codicil. I should add that if it were necessary to have any confirmation of what was the intention of the testator, I should find it very plainly expressed by the deed which was executed subsequently to the codicil. It must be declared that the testator's will was a valid execution of the power in the settlement.

From this decision the Defendant appealed. The appeal was heard on the 7th of June, 1880.

Levett (Sir *H. Jackson*, Q.C., with him), for the Appellant:—

The mortgage of the 31st of December, 1873, the draft of which must have been before the testator when he made his codicil executed the day before, shews that he considered the trusts of the settlement to be still existing. It was one of the surrounding circumstances which may be looked at: *In re Ruding's Settlement; Boyes* v. *Cook* (2).

[JAMES, L.J.:—It was not one of the surrounding circumstances. It cannot be looked at in ascertaining the intention of the testator in making the codicil.]

The codicil and the will must be read together.

[JAMES, L.J.:—Is there any authority for the proposition that

(1) Law Rep. 14 Eq. 266. (2) 14 Ch. D. 53.

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In re CLARK'S ESTATE. MADDICK *v.* MARKS.

a codicil can be read with the will for the purpose of shewing that a contrary intention appears on the will?]

I can produce no authority, but on all principle the codicil and will form one instrument. The codicil clearly recognises the settlement as existing and in force. Where the settlement containing the power has been made by the testator himself, the presumption is that he did not intend to defeat his own settlement: *Moss* v. *Harter* (1). In commenting on that case Lord *St. Leonards* says (2): "Where the property is, as in this case, settled by the testator himself upon others, in default of any appointment by him under his power it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power."

Hemming, Q.C., and *Popham*, for the Plaintiff, were not called on.

JAMES, L.J.:—

I can see no ground for differing from the Vice-Chancellor in this case. Unless we violate the Act, we must hold that the testator executed the general power contained in the settlement, if we do not find a contrary intention expressed in the will. There is no such contrary intention in this will. But it is contended that the codicil and will must be read together as one instrument. If that can be done for this purpose, the codicil is full of indications that the testator intended the will to operate as an appointment. Therefore, either taking the will separately, or taking the will and codicil together, there is no contrary intention shewn within the Act. The appeal must be dismissed.

COTTON, L.J.:—

I am also of opinion that the Vice-Chancellor came to a right conclusion. Mr. *Levett* has urged every point that could be urged, but has failed to convince me to the contrary. What we have to decide is whether the will is not an execution of the general power of appointment contained in the settlement in consequence of the expression of a contrary intention in the will. If the will stood

(1) 2 Sm. & Giff. 458. (2) Sugden on Powers, 8th Ed. p. 306.

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alone there could be no doubt. But it is said that we ought to look at the will and codicil together. If we are at liberty to look at the codicil for this purpose, we must take care not to fritter away the distinct words of the Act. It appears to me that the codicil does not express any intention with respect to the execution of the power contained in the settlement. It simply says that the shares of the *Denman* family under it are to be satisfied by the debts due from *J. L. Denman* other than the debt of £1000. In my opinion there is nothing to shew a contrary intention either in the will or the codicil.

With respect to the extract that has been read from Lord *St. Leonards*' Treatise on Powers, I do not quite understand whether it is a statement of his own opinion, or merely a comment on the effect of *Moss* v. *Harter* (1). But if it is to be taken as an expression of his opinion that, in the case of a power of appointment in a settlement created by the testator himself, an indication of his intention to defeat his settlement must be shewn, that appears to me to contradict the words of the statute, and I should hesitate to act, even upon Lord *St. Leonards*' authority, against the expressed intention of the Legislature.

THESIGER, L.J.:—

I am of the same opinion. I wish to express no opinion on the question whether the codicil can be resorted to for the purpose of shewing a contrary intention in the will; but I agree that, even if this can be done, there is nothing in the codicil to indicate any such contrary intention.

JAMES, L.J.:—

I wish to add, with reference to what has been said by the Lord Justice *Cotton*, that if Lord *St. Leonards* is to be understood as saying that the Act is to receive a different interpretation as regards a power contained in a settlement created by the testator from that which it would receive in other cases, I do not agree with his opinion.

Solicitors: *Wilkinson & Son; Phillips & Son.*

(1) 2 Sm. & Giff. 458.

C. A.
1879
V.-C. B.
Dec. 20.
1880
Jan. 13.
C. A.
May 12.

18 Ch D 592

In re STAPLEFORD COLLIERY COMPANY.

BARROW'S CASE.

Company—Shares "fully paid up"—Non-Registration of Contract—Companies Act, 1867, *s.* 25.

A contract for sale and purchase between two vendors and a limited company provided that the purchase-money of £5115 should be "paid or satisfied" as to £2000 to *B.*, one of the vendors, and as to the remaining £3115 to *H.*, another vendor; that of *B.*'s £2000, the company should pay to him £500 in cash, and satisfy the remaining £1500 by issuing or transferring to him 300 fully paid-up shares of £5 each, and registered as fully paid up; and that as to the £3115, the company should either pay the same to *H.* in cash, or, at the option of either the company or *H.*, should issue or transfer to *H.* 623 shares of £5 each, issued and registered as fully paid up.

The contract was never filed with the Registrar of Joint Stock Companies.

The 300 shares were issued as fully paid up to *B.*, who was the chairman and managing director of the company down to the date of the winding-up, soon after which event *B.* died.

The 623 shares were issued as fully paid up to *H.*, who transferred 134 of them for value to the applicant, who was the paid secretary and solicitor of the company. *H.* also transferred 450 others for value in the following way: 120 were transferred direct to *B.*; 100 were transferred to the applicant, who transferred them for value to *B.*; and 230 more were transferred to strangers, who again transferred them, some for value, and a few for a nominal consideration only, to *B.*

Upon *B.*'s death the applicant became his executor:—

Held, by *Bacon*, V.C., that the applicant must be placed on the list of contributories for the 134 shares standing in his own name, and for the 750 standing in the name of his testator, as shares to be paid for, under sect. 25 of the *Companies Act*, 1867.

Held, on appeal (affirming the decision in other respects), that the 230 shares having been transferred to purchasers without notice that they were not fully paid up, and being registered in the books of the company as paid-up shares, must, as between the company and the transferees, be treated as fully paid up shares, and that the transferees could give a good title to purchasers from them, whether with or without notice, and that accordingly those shares when transferred to *B.* must be equally treated as paid up, although he had purchased them with notice that they were not in fact paid-up shares.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*, on a summons which had been adjourned into Court in the winding-up of the *Stapleford Colliery Company, Limited*. The

application was made on behalf of *Bridgman Langdale Barrow* to vary the Chief Clerk's certificate, dated the 5th of August, 1879, by removing from the list of contributories of the *Staple-ford Colliery Company, Limited,* the name of the applicant as the holder of 134 shares upon which nothing had been paid, and by settling him upon the same list in respect of the same shares as fully paid; and by removing from the list the name of the applicant as executor of *Richard Bridgman Barrow* as the holder of 750 shares in the company upon which nothing had been paid, and by settling him upon the list in respect of the same shares as fully paid.

The company was incorporated on the 11th of January, 1871, the shares being of the nominal value of £5. Amongst others *William Hill* signed the memorandum of association for 200 shares.

By an agreement dated the 10th of May, 1871, and made between the company of the one part, and the above-named *William Hill* and *Richard Bridgman Barrow,* as vendors, of the other part, after reciting an indenture of lease dated the 28th of October, 1868, that the same had become vested in *Hill* and *Richard B. Barrow,* and that the company had been formed for acquiring the leasehold premises, colliery, machinery, and works, and for working the same, it was agreed between and by the parties as follows:—1. The vendors were to sell and the company were to purchase the property as and from the 1st of May, 1871, at or for the price of £5115, "to be paid or satisfied to the persons and in the manner" thereinafter mentioned. Clause 2 related to the delivery of the abstract; 3, to the title; 4 provided that the purchase was to be completed on the 1st of June, 1871; and 5 related to delivery of possession, and conveyance.

Clause 6 was as follows:—

"The said price or purchase-money of £5115 shall be paid or satisfied, as to £2000, part thereof, to the said *Richard Bridgman Barrow,* and as to the sum of £3115, the residue thereof, to the said *William Hill;* and of the said sum of £2000 the company shall pay to the said *Richard Bridgman Barrow* the sum of £500 in cash (and shall satisfy the sum of £1500, the residue of the said sum of £2000, to the said *Richard Bridgman Barrow,* by

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issuing or transferring to him 300 shares of £5 each in the capital of the company, issued and registered as fully paid up); and as to the said sum of £3115 the company shall either pay the same to the said *William Hill* in cash, or, at the option of either the company or the said *William Hill*, shall issue or transfer to the said *William Hill* 623 shares of £5 each in the capital of the company issued and registered as fully paid up. And the said *Richard Bridgman Barrow* and *William Hill* shall respectively accept each of the fully paid up shares which shall be issued or transferred to them respectively as aforesaid at par, or in satisfaction of £5 of the said purchase-money. And the 200 shares in the company for which the said *William Hill* has subscribed shall, if the said *William Hill* shall so require, be taken and treated as part of the said 623 shares so to be issued or transferred to him as aforesaid, and shall in that case be deemed to be fully paid up, and shall be issued and registered as such accordingly."

Clause 7 provided for the costs of the purchase.

This agreement was on the 10th of May, 1871, resolved to be adopted and executed, and was executed by the company; but it was never at any time filed with the Registrar of Joint Stock Companies.

On the 10th of June, 1871, it was resolved that the capital then issued should be £10,000, in 2000 shares; that 623 of such shares calculated as paid up should be issued to *William Hill*, "in discharge of his contract with the company dated the 10th of May" then last; and that 300 more of such shares calculated as paid up should be issued to *Richard B. Barrow* "in discharge *pro tanto* of the sum of £2000 due to him under the said contract."

On the 26th of June, 1871, it was resolved that the seal of the company be affixed to the share certificates to be delivered to *William Hill* and *Richard B. Barrow* respectively, and that they be delivered to them respectively on their transfer to the company of the colliery lease.

On the 28th of June, 1871, *William Hill* and *Richard B. Barrow* executed the assignment of the lease, and on the same day the company took possession of the works as from the 1st of May preceding.

At a meeting of directors held on the 30th of August, 1871, it was resolved that a cheque be drawn in order to carry out the agreement with *Richard B. Barrow*, and that the share certificates for 300 shares, representing the sum of £1500, be delivered at the same time.

The 300 shares referred to in the resolution of the 30th of August, 1871, were allotted to *Richard B. Barrow* on the 7th of September, 1871; and no cash was ever paid in respect of them. On the same day he signed a receipt on the assignment in these terms: "Received of the above named *Stapleford Colliery Company, Limited*, the sum of £500 cash and £1500 by allotment of 300 fully paid up £5 shares in the said company, being the consideration within expressed to be paid by the said company to me. *R. B. Barrow*."

No letter of allotment of the 300 shares was ever sent to *R. B. Barrow*, but the shares were entered as fully paid up on the register; and the return from time to time to the Registrar of Joint Stock Companies included the 300 shares among those fully paid up.

The 623 shares were issued and allotted to *William Hill*, and were transferred by him in the following way:—

As to 100 shares, *Hill* transferred them for £369 7*s.* 1*d.* to *J. G. Kimpton*, who was the engineer of the company, and *Kimpton* transferred eighty of them for £269 to *Richard B. Barrow*.

As to 234 shares, *Hill* transferred them for £1053 to *Bridgman Langdale Barrow*, who kept 134 of them, and transferred the remaining 100 for £450 to *Richard B. Barrow*.

As to 120 shares, *Hill* transferred them for £531 to *Richard B. Barrow*.

As to the remaining 169 shares, *Hill* transferred them for £150 to two persons named *Cox*, who transferred fifty, for £212 10*s.*, and afterwards 100 more, for 5*s.*, to *Richard B. Barrow*, and the remaining nineteen for 5*s.*, back to *Hill*, who again transferred them for value to persons not parties to this application.

The result of these transfers was that *Richard B. Barrow* became the holder of 450 of *Hill's* shares, making, together with his own original 300, the 750 shares mentioned in the summons; and *Bridgman L. Barrow* became the holder of 134 of *Hill's* shares.

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On the 20th of January, 1876, the company was ordered to be wound up, and the official liquidator placed the applicant's name on the list for the shares above mentioned, or "subject to the payment of the whole amount thereof in cash," under sect. 25 of the *Companies Act*, 1867.

Mr. *Barrow* the elder was a director and chairman of the company from the commencement. Since the date of the winding-up order, he had died; and *Bridgman L. Barrow*, his son, who had been the solicitor and paid secretary of the company from the commencement, became his father's sole executor.

The applicant deposed that the contract was executed in duplicate, for the purpose of having one copy registered, and that the two documents were taken by the late Mr. *Barrow* to an agent in *London*, with instructions "to do all that was necessary and proper, and to see to its being properly registered." The applicant did not discover until the 17th of April, 1872, that the agreement had not been filed; and an attempt was then made to file it, which was abandoned as useless.

It was asserted and not denied, that nothing was ever paid on the shares in question, and that at the time when Mr. *Barrow* the elder's shares were allotted to him, the company were indebted to him in the sum of £1500.

The summons was heard before Vice-Chancellor *Bacon* on the 20th of December, 1879.

Westlake, Q.C., and *Northmore Lawrence*, for the applicant:—

The questions are two—1. As to all the shares, the contract did not require to be filed at all under the 25th section of the *Companies Act*, 1867; and 2. As to the shares which passed through the hands of innocent transferees for value, the applicant is not liable to be placed on the list, on the authority of *Burkinshaw* v. *Nicolls* (1).

There is also a subsidiary question, whether, as *William Hill* signed the memorandum of association for 200 shares, he and his allottees are not entitled to have 200 of the 623 shares allotted to *Hill*, treated as fully paid up, on the authority of *Maynard's Case* (2).

(1) 3 App. Cas. 1004. (2) Law Rep. 9 Ch. 60.

As to the first point, the decision in *White's Case* (1) does not apply here, because this was not a contract absolutely to give and take shares in payment for the colliery property—it was a contract whereby an option was reserved to either party. Under the contract, neither *Hill* nor *Barrow* could have claimed shares if the company had refused to issue them, nor could the company have refused to pay in cash if the vendors had insisted upon having money instead of shares. The option applied to both vendors, though more clearly expressed in the case of *Hill* than in that of *Barrow*. In the language of Lord Justice *Cotton* (2), "The Act of Parliament is satisfied if, at the time, there was money due by the company to the shareholder, which could be satisfied by the calls due on the shares, and if there was an agreement in effect that it should be so satisfied." To decide in favour of this application would be to defeat the *bona fides* of the statute, and to bear hardly upon an innocent transaction.

The above contention applies to all the shares; but as to the eighty and 150 transferred to the elder *Barrow* through *Kimpton* and the Messrs. *Cox*, the case is governed by *Burkinshaw* v. *Nicolls* (3). The doctrine of estoppel applies—that is to say, the company, having represented to *Kimpton* and the Messrs. *Cox* that the shares were fully paid up, must be held to have represented to them that they were fully paid up in cash (4). Then the shares, having come to *Barrow* from an innocent holder for value, must be treated as free from liability, following the well-known equity of a purchaser for value with notice, from a man who bought for value without notice (5).

In this case the applicant deposes that he believed, and believes that his father believed that the contract had been filed.

Sir *H. Jackson*, Q.C., and *Cracknall*, for the official liquidator:—

If this be a hard case, there is at least this feature in it, that every step in the transaction was known to the applicant and his testator. One was the paid secretary and solicitor, the other the

(1) 12 Ch. D. 511.
(2) Ibid. 519.
(3) 3 App. Cas. 1004.
(4) Ibid. 1021.
(5) See Tudor, L. C. in Eq. vol. ii. p. 42, referring to *Harrison* v. *Forth*, Prec. Ch. 51.

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managing director of this company. With the default of the agent the official liquidator can have nothing to do.

The result of the authorities is this. If the contract be a contract for payment in money, and payment is made either in money or money's worth, the contract need not be registered: *Spargo's Case* (1); but if the contract be for payment in shares, and that contract be not registered, then the allottee must pay over again in cash. If the contract be one upon which the pleading in an action would be "accord and satisfaction," the statute is attracted, and the money must be paid. That that is this contract there can be no doubt. The words are "paid *or* satisfied"—that is to say, in *Barrow's* case, partly paid in cash and partly satisfied in shares. In *Hill's* case an option is mentioned, but the option was exercised, and the consideration was given in shares.

As to the second point, it is quite an assumption that the equitable doctrine applies, where the shares are in the hands of men who had personal knowledge of every step in the transaction. They were parties to the issuing of the certificates, to the registration of the transfers, and to the sending in of reports to the Registrar. No such absence of notice is here as was to be found in *Burkinshaw* v. *Nicolls* (2). The applicant and his testator knew all along that the shares had not been paid for.

Westlake, in reply:—

The words "paid or satisfied" do not mean partly paid and partly satisfied; they mean "either" paid "or" satisfied. When the contract was signed, there arose as to *Hill* a liability on the part of the company to pay him £3115, and there did not arise a liability to issue to him 623 fully paid-up shares until a later period, that is to say, not until an option was exercised. Such a contract is not within the statute. The proper pleading in an action on this contract would be set-off, not accord and satisfaction.

Neither *Hill*, nor *Kimpton*, nor the Messrs. *Cox*, are to be held liable for the non-filing of the contract, nor for any default on the part of the agent of Messrs. *Barrow*.

(1) Law Rep. 8 Ch. 407. (2) 3 App. Cas. 1004.

BACON, V.C.:—

It has been said that this is a hard case, and so no doubt it is, as generally happens where the intention of the parties to the contract cannot be carried out as they intended, and the result is prejudicial to one of them. With the hardness of the case I have nothing whatever to do, and I mention the matter only because I wish it to be understood that what has been said on the subject is present to my mind. What I have to do is to see that the requirements of a certain statute have been complied with.

Now the section (25) of the *Companies Act*, 1867, is so clear and explicit, that it is only necessary to read the language in order to see what is the object of the enactment, and what is the policy of the law.

The words are:—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

I am not at liberty to disregard that enactment. It expresses the law, and I should say it expresses it in the way in which the law ought to be expressed. This law was passed as much for the protection of the public as in the interests of members of joint stock companies. The Legislature, considering the powers which joint stock companies have, and the contrivances which may be resorted to between them and the persons with whom they deal, has thought it essential for the public safety that if shares are issued for anything else than money the fact shall be registered, so that all the world may be acquainted with it. That is the meaning of the section. It is no piece of arbitrary or haphazard legislation. It is a law made for a plain purpose, and the meaning is expressed in most distinct terms.

I find here a contract entered into for the issue of shares to two gentlemen named *Barrow* and *Hill*. That contract has not been registered, and the consequence is that these shares are subject to the payment of the whole amount thereof in cash. The persons to whom the shares were allotted must be treated as ordinary shareholders, subscribing for the shares, and liable to pay the calls

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upon them. Mr. *Westlake's* argument on the construction of this contract is one which I am unable to adopt. The parties came to an agreement that the purchase-money should be discharged in one of two ways. Either it had to be paid in money, or to be satisfied by the issue of paid-up shares. There can be no doubt or question about the intention and meaning of the parties. The words referred to are "paid or satisfied," and those words run through the whole of the agreement. The 4th clause is so expressed, and the 6th clause, which is more important, runs thus: "The said price or purchase-money of £5115 shall be paid or satisfied, as to £2000, part thereof, to the said *Richard Bridgman Barrow*, and as to the sum of £3115, the residue thereof, to the said *William Hill;* and of the said sum of £2000, the company shall pay to the said *R. B. Barrow* the sum of £500 in cash, and shall satisfy the sum of £1500, the residue of the said sum of £2000, to the said *R. B. Barrow*, by issuing or transferring to him 300 shares . . . . issued and registered as fully paid up." The object and intention of the parties thus far was clear and distinct. Then the contract goes on: "And as to the said sum of £3115, the company shall either pay the same to the said *William Hill* in cash, or at the option of either the company or the said *William Hill* shall issue or transfer to the said *William Hill* 623 shares, ... registered as fully paid up." So that, with regard to *Hill's* shares, there was an option reserved to either party. That option is exercised, and the company issue shares not subject to payment, and they do not register the contract under which those shares are issued. In the case of *Barrow* there was no option; the company were to pay him partly in money and partly in paid-up shares. As to *Hill*, an option was reserved. The option was exercised in favour of payment in shares, and the shares were issued to him as fully paid up. Another part of the arrangement was that the 200 shares for which *Hill* had signed the memorandum of association should be treated as part of the 623 shares so issued to him under the contract.

Under these circumstances it would be very difficult to resist the application in the face of the decision in *White's Case* (1). In that case the principles of law relating to the subject were very

(1) 12 Ch. D. 511.

minutely examined, and the decision was arrived at, I was going to say, reluctantly. The utmost ingenuity was shewn in endeavouring to find a mode of escape for the shareholder; but it was held that if the bargain between the parties was for the payment, not of money simply, but of something else than money, namely, fully paid-up shares, and the contract has not been registered, the shares must be paid for.

As to the shares, then, that were taken by *Barrow* and *Hill*, the Act of Parliament has been clearly violated, and the consequence is that these shares must still be paid for.

Then it was argued that, as to the 450 shares which came into the hands of *Barrow* the father, and as to the 134 shares which came into the hands of *Barrow* the son, in the manner which has been described, the father's estate and the son are not affected by any informality, irregularity, or invalidity in the original transaction; and in support of that an argument was addressed to me to shew that there has been an estoppel. But the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract *inter partes*, and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament. It cannot be doubted that the statute covers this contract; nor can it be argued that it is possible for directors, by issuing fully paid-up shares which get into the hands of holders for value without notice, to avoid the requirements of the statute. The Act of Parliament was designed for the protection of creditors; it was consideration for the rights of creditors which caused the enactment to be made; it is the creditors whose rights will be sacrificed if the Act can be violated with impunity. I am of opinion that, as between the parties to this contract, there was no estoppel; they contracted to do a thing which in the result it was unlawful to do, and which could only have been made lawful by registration.

The case in the House of Lords has been referred to as an authority in favour of the applicant. That was a decision given under totally different circumstances. The doctrine of that case is, that an innocent party shall be protected, and shall not suffer by the misfeasance of others by whom he has been led into the transaction. But what has that case to do with this, where Mr. *Barrow*

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the elder was chairman and managing director, and Mr. *Barrow* the younger, his son, was solicitor and secretary of the company, and both were cognizant of every step in the transaction, and knew that the agreement must be registered in order to make it valid? Mr. *Barrow* states to the Court that instructions for filing the contract were given, and that he supposed it had been registered; and it appears that it was sent to the agent in *London*, and that he omitted to get it registered. That may be a matter to be regretted, but the omission cannot have the effect of repealing the Act of Parliament, and the consequence of the omission must be borne by the person who employed the agent. It has been said that it was not the duty of the Messrs. *Barrow* to register the contract; but both being subjects of the realm must be taken to know the law of the realm, and must be held bound to conform to the requirements of the Act of Parliament. The omission to register having been made, it is they who must abide the consequences of the omission, and not the creditors or other persons whose rights are intended to be protected by the statute.

I have been unable to follow the distinction that has been drawn between the case of the 200 shares for which Mr. *Hill* signed the memorandum of association and the rest of the 623 shares which were issued to him. With what has been done since in the way of putting Mr. *Hill's* name on the list of contributories I have nothing whatever to do. I deal only with the facts which are clearly in evidence, namely, that of the 623 shares which were originally issued to *Hill*, some are found to be in the name of Mr. *Barrow* the younger, and the rest in the name of Mr. *Barrow* the elder at the date of the winding-up.

I should be very ready to follow the decision in the House of Lords, that a person wholly unacquainted with an irregularity which may have taken place in the issuing of shares, is to be protected against the misconduct of directors. But I cannot consider these two gentlemen, the Messrs. *Barrow*, as being in any way innocent holders. There is, I am happy to say, no trace of any kind of misconduct or fault on the part of any one in this case. I am willing to believe that the omission to register was an oversight; but whether it was so or not, it is my duty, in administering the law under this statute, to say, inasmuch as these

shares were bargained for, not on a payment of money, but as a satisfaction of the contract which had been entered into that the shares were to be issued as paid-up shares, and the contract was not registered, that they remain unpaid-up shares; and the consequence is that the applicant must of necessity be placed on the list of contributories for all the shares mentioned in the summons.

The application must be dismissed with costs.

C. A.

From this order *Bridgman Langdale Barrow* appealed, except as to the 300 shares issued to his father as fully paid up (see clause 6 of agreement for sale).

The appeal therefore related to the 134 shares which he possessed in his personal capacity, and to 450 out of the 750 shares which he held in his representative capacity as executor of his father.

The appeal was heard on the 12th of May, 1880.

Westlake, Q.C., and *Northmore Lawrence*, repeated the arguments used in the Court below.

Sir *H. Jackson*, Q.C., and *Cracknall*, were only called upon as to the 150 and eighty shares which came through *Kimpton* and the Messrs. *Cox* respectively.

They argued that it was the duty of the Messrs. *Barrow*, as officers of the company, to see that the company got cash for the shares, and that they, being affected with notice of the non-registration of the contract, could not gain any advantage by taking from a purchaser without notice. They referred to *Sugden* on Vendors and Purchasers (1).

Although a purchaser buying from a trustee without notice would be protected, yet the trustee would still be bound by the trust were he to repurchase the estate, for his liability did not cease by the sale.

JESSEL, M.R.:—

This is an appeal from an order of Vice-Chancellor *Bacon* putting the present Appellant as a contributory on the list for a

(1) 13th Ed. p. 620.

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very large number of shares. As to a portion of the shares they were subscribed for in the memorandum of association, and as to another portion of the shares they were allotted in pursuance of an agreement by which the company agreed to buy the colliery and to pay for it according to an option—I am speaking of these particular shares—in cash or shares. There is another question totally distinct which I will mention presently. The Appellant says that inasmuch as there was an option to pay for the colliery in cash or shares, and the option was exercised by the company to pay in shares, there was not an agreement to take shares for the colliery. I cannot accede to that argument. The agreement was to give an option, and the option was exercised, therefore clearly it was an agreement which required to be registered.

The next point suggested was that the shares had in fact been paid for, that is, that the money due from the company to the Appellant or his father, for he appears partly in a representative character, was actually paid on the shares by way of set-off. Now, in order for the Appellant to succeed on that argument he must shew that there was money due from the company which could be set off. There never was any due as regards these shares before the time for conveying the property had arrived, that is, before any money was receivable from the company, the company had exercised the option to pay in shares; so that there never was a moment of time when there was any money due from the company to the Appellant or his father which was capable of being set off. I think these reasons dispose of all the arguments on behalf of the Appellant which are worth attending to in support of the appeal on this part of the case.

But there is another part of the case. It appears the Appellant's father was the chairman and the Appellant was the solicitor of the company, and that they sent up the agreement to *London* for registration, but through some neglect it was not registered. I only mention this to shew that there was nothing like fraud or intended deception. Then the owner of the shares under the agreement sold them in the open market, eighty to a man named *Kimpton* and 150 to a man named *Cox*, who paid for them as duly paid-up shares, and they were registered as such. Now, after that it was manifestly impossible on the part of the company to

say with effect as against *Kimpton* and *Cox* that those 230 shares were not fully paid up; the evidence of payment against them was complete upon their representation, neither *Kimpton* nor *Cox* having any notice that they were not paid up. The result was that *Kimpton* and *Cox* were absolute owners of paid-up shares as between them and the company, the consequence being that they had a right to sell them and to give a good title, not only to people who had no notice but to people who had notice. The ultimate result, therefore, is, that though they sold to the Appellant, or the Appellant's father who had notice, those purchasers were entitled to hold the shares as paid up just in the same way as *Kimpton* and *Cox* could hold them. The only exception, and the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or, a fraudulent man who has acquired property by fraud saying he sold it to a *bonâ fide* purchaser without notice and has got it back again. Those are cases to shew that a person shall not take advantage of his own wrong. But the present Appellant had not done wrong; the shares had been sold for value. The Appellant and his father were not trustees of the shares, and therefore they did no wrong in buying them back. Therefore it appears to me that the notion that the fact of their being officers of the company makes a difference in their title is altogether unfounded, and that the appeal must be allowed as regards the 230 shares.

As the Appellant partly succeeds and partly fails there will be no costs of the appeal.

JAMES and BAGGALLAY, L.JJ., concurred.

Solicitors: *Crosley & Burn; F. C. Greenfield.*

C. A.

1880

May 6, 13.

Ex parte FALK. *In re* KIELL.

Vendor and Purchaser—Stoppage in Transitu—Subsale—Rights of Original Vendor against unpaid Purchase-money of Sub-purchaser—End of Transit—Constructive Delivery—Shipowner's Lien for Freight.

When the purchaser of goods has resold them, though the vendor loses by the resale the right to stop the goods themselves *in transitu*, he is entitled, if he gives that which would, had there been no resale, have been a valid notice of stoppage *in transitu*, to intercept, to the extent of his own unpaid purchase-money, so much of the sub-purchaser's purchase-money as remains unpaid by him.

Ex parte Golding Davis & Co. (1) approved and followed.

Per *Bramwell*, L.J.: Observations on *Slubey* v. *Heyward* (2) and *Hammond* v. *Anderson* (3).

Semble, that notice of stoppage *in transitu* given to a shipowner imposes no duty on him to communicate the notice to the master of the ship, and that it is not effectual until it is communicated to the master.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

G. M. Kiell was a merchant in *London*, carrying on business as *G. M. Kiell & Co.* *H. E. Falk* was a salt merchant at *Liverpool*. *Kiell* was in the habit of purchasing salt in *England* for consignment to and sale in *India*, and on the 25th of March, 1878, he entered into a contract with *Falk* for the purchase of a cargo of salt, to be shipped at *Liverpool*, in a ship called the *Carpathian*, for *Calcutta*.

The contract was contained in the following letter written by *Falk* to *Kiell*:—

"*Liverpool*, 25 March, 1878.

"I agree to furnish you cargo *Calcutta* salt half-and-half mats inclusive for the *Carpathian* as per charterparty, at the price of 13*s.* 5*d.* per ton f. o. b., payable as customary charges 4*s.* 5*d.* in cash on invoice, and balance by your acceptance at four months from date of shipment, *i.e.*, B/L.

(Signed) "*H. E. Falk.*"

The *Carpathian* had been chartered by *Kiell* for the voyage to

(1) 13 Ch. D. 628. (2) 2 H. Bl. 504.
(3) 1 B. & P. (N.R.) 69.

Calcutta, and in pursuance of the above contract a cargo of salt was placed on board her by *Falk*. On the 25th of April, 1878, *Falk* wrote to *Kiell* as follows:—"I have now the pleasure of handing you inclosed bills of lading and invoice of salt *ex Carpathian*, and amounting to £1263 0*s*. 8*d*., part of which, £415 12*s*. 2*d*., for river freight, &c., be good enough to pay into the *Bank of England* to my credit, and the balance, £847 8*s*. 6*d*., I have drawn upon you at four months as per inclosed bill, which be good enough to return to me accepted."

Kiell forthwith accepted the bill of exchange for £847 8*s*. 6*d*., and returned it to *Falk*, and he paid the £415 12*s*. 2*d*. into the *Bank of England* to the credit of *Falk*. The *Carpathian* left *Liverpool* on the 21st of April, 1878, and she arrived in the port of *Calcutta* on the 29th of July, 1878. *Kiell* consigned the salt to *Wiseman, Mitchell, & Co.*, of *Calcutta*, as his agents. Their agents in *Great Britain* were *T. Wiseman & Co.*, of *Glasgow*, and through that firm *Kiell* obtained an advance from the *Bank of Scotland* at *Glasgow* upon the security of the bills of lading of the salt (which he indorsed to the bank), and of a bill of exchange drawn by *T. Wiseman & Co.* upon and accepted by him. The bill of lading and the acceptance of *Kiell* were in due course forwarded by the *Bank of Scotland* to their agents in *Calcutta*, and were at the same time advised by post by *T. Wiseman & Co.*, of *Glasgow*, to *Wiseman, Mitchell, & Co.*, of *Calcutta*. The usual course of procedure between *Kiell*, as consignor, and *Wiseman, Mitchell, & Co.*, as his consignees, was for the latter to realize in *India* the goods consigned to them, and, after deducting from the proceeds their commission and charges, to remit the balance to the *Bank of Scotland* at *Glasgow*, who, having repaid themselves the amount which they had advanced upon the goods, paid the balance to *T. Wiseman & Co.*, who in their turn paid or accounted for the same to *Kiell*. This course was pursued in reference to the cargo of salt shipped in the *Carpathian*.

On the 17th of July, 1878, *Wiseman, Mitchell, & Co.*, as agents for *Kiell*, sold the cargo of salt "to arrive" to various sub-purchasers in *Calcutta*, at the rate of 80 rupees per 100 maunds. *Wiseman, Mitchell, & Co.*, in consideration of a special commission, guaranteed to *Kiell* the proceeds of sale. On the 20th of July, 1878, *Kiell*

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filed a liquidation petition in the *London* Bankruptcy Court. Under this petition his creditors subsequently resolved to accept a composition, payable in three instalments, and secured by (*inter alia*) an assignment of all the property of the debtor (except some land in *South Africa*) to *C. F. Kemp* on trust for sale. *Kiell* failed to pay the second instalment of the composition, which fell due on the 24th of June, 1879, and in July, 1879, he was adjudicated a bankrupt, and *Kemp* was appointed trustee of his property. On the 27th of July, 1878, *Falk* served on the owners of the *Carpathian* in *Liverpool* a notice to stop the cargo of salt *in transitu*, claiming by the notice delivery of the salt to himself, and offering to pay the freight on delivery. On the 29th of July, 1878, as already stated, the *Carpathian* arrived in the port of *Calcutta*. On the 30th of July, 1878, *Wiseman, Mitchell, & Co.* presented to *Steele & Co.*, of *Calcutta*, who were the agents there of the shipowners, the bills of lading for the cargo, and on the same day *Wiseman, Mitchell, & Co.* received from *Steele & Co.*, in exchange for the bills of lading, delivery orders for the whole cargo. These orders directed the master of the ship to weigh and deliver the salt to the respective persons who had bought it "to arrive"; and on the same day *Wiseman, Mitchell, & Co.* handed over the delivery orders to the respective sub-purchasers. On the 31st of July, 1878, the shipowners (who had previously taken no steps in consequence of the notice to stop *in transitu* which had been served on them on the 27th of July) sent the following telegram to *Steele & Co.* in *Calcutta*, which *Steele & Co.* received the same day: —"Charterers *Carpathian* failed. Unless bill of lading held for value, don't deliver." On the 3rd of August, 1878, the delivery of the salt over the ship's side into the buyers' lighters was commenced, and on that day 1000 maunds were delivered. No delivery took place on the 4th of August. On the 5th of August 2800 maunds were delivered. The delivery continued until the 31st of August, when the delivery of the whole of the cargo (which consisted of 49,195 maunds) to the sub-purchasers was completed. The cargo was weighed over to the sub-purchasers as it was delivered over the ship's side. The net price realized by the sale of so much of the cargo as was delivered to the sub-purchasers after the 5th of August exceeded £1000. On the 2nd

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of August, 1878, *Falk* sent the following telegram to *Balme, Lowrie, & Co.*, of *Calcutta*, his agents there:—"Stop cargo *Carpathian transitu* for *Falk* unpaid vendor. Notify captain agents." On the 5th of August, 1878, Messrs. *Orr & Harris*, attorneys at *Calcutta*, in pursuance of instructions given to them by *Balme, Lowrie, & Co.*, served notices of stoppage *in transitu* on the master of the ship and on *Wiseman, Mitchell, & Co.* These notices in terms applied only to the "cargo now on board." *Orr & Harris* on the same day informed *Steele & Co.* of these notices. *Steele & Co.* and the master of the ship replied through their attorneys that they could recognise no one as having any title to the salt except the holders of the bill of lading. On the 10th of September, 1878, *Wiseman, Mitchell, & Co.* forwarded by post to *Kiell* an account of the sales of the cargo, which shewed that the net proceeds amounted to £1566 3*s.* 2*d.* That sum was remitted by *Wiseman, Mitchell, & Co.* to the *Bank of Scotland* at *Glasgow*, who, after deducting what was due to them in respect of the advance which they had made to *Kiell* upon the security of the bill of lading, paid the balance, amounting to £426 10*s.* 2*d.* to *Kemp*, as *Kiell's* trustee. *Kiell's* acceptance for £847 8*s.* 6*d.* was dishonoured at maturity. *Falk* claimed the £426 10*s.* 2*d.* from the trustee, on the ground that he had given a valid notice of stoppage *in transitu*, and he applied to the Court for an order that the trustee should pay the £426 10*s.* 2*d.* to him. A statement of facts (from which the above statement is taken) was agreed upon between the parties. It was agreed that the Court was to be at liberty to draw inferences of fact. The statement did not shew whether, on the 5th of August, 1878, the whole or any part of the freight for the cargo had been paid to the shipowners.

The Registrar refused *Falk's* application.

Falk appealed.

Cohen, Q.C., and *F. Thompson*, for the Appellant:—

If there had been no pledge of the bill of lading by the purchaser, and no subsale, there would have been an effectual stoppage *in transitu* from the time when the owners of the ship could with reasonable diligence have communicated to the master at *Calcutta* the notice which was served on them at *Liverpool* on the

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27th of July. It was their duty to communicate that notice with reasonable diligence to the master: *Blackburn* on Sale (1); *Litt* v. *Cowley* (2); *Whitehead* v. *Anderson* (3).

[JAMES, L.J.:—That is not a judicial decision that any such duty is imposed on the shipowner; it is only a decision that, at the most, he could be under no further obligation. *Parke*, B., says (4): "The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery; and in the present case such diligence was used."]

At any rate, notice to the shipowner must be sufficient to give the unpaid vendor an equitable right to intercept the unpaid purchase-money of the sub-purchaser, when, as in the present case, notice, to whomsoever given, would not have enabled him to stop the delivery of the goods themselves to the sub-purchaser. But the notice which was given to the shipowners on the 27th of July could in the ordinary course of business have been communicated by them to the master on his arrival at *Calcutta*. The shipowners ought to have communicated with the master by telegraph: *Proudfoot* v. *Montefiore* (5); *Kaltenbach* v. *Mackenzie* (6). The property in the salt did not pass to the sub-purchasers until it had been weighed, and the weighing was not commenced until the 3rd of August. The giving of the delivery orders to the sub-purchasers did not amount to an attornment by the master of the ship. It was not a new agreement; it was only a fulfilment of the obligation imposed on the master by the bill of lading. It was not equivalent to a delivery of possession to the sub-purchasers: *Coventry* v. *Gladstone* (7); *McEwan* v. *Smith* (8). The *Factors Law Amendment Act*, 1877 (40 & 41 Vict. c. 39), does not affect the question. But at any rate on the 5th of August notice of stoppage *in transitu* was given to the master of the ship. At that time only about 8 per cent. of the cargo had been delivered. There had been no constructive delivery of the whole: *Ex parte Cooper* (9). The order to the master was to weigh and deliver

(1) Page 269.
(2) 7 Taunt. 169.
(3) 9 M. & W. 518.
(4) Ibid. 534.
(5) Law Rep. 2 Q. B. 511.
(6) 3 C. P. D. 467.
(7) Law Rep. 6 Eq. 44.
(8) 2 H. L. C. 309.
(9) 11 Ch. D. 68.

to the sub-purchasers. There could not be delivery without weighing, and there could not be a constructive weighing of the whole: *Hanson* v. *Meyer* (1). The mere fact that the ship had arrived at the port of destination was not enough to put an end to the *transitus*: *James* v. *Griffin* (2); *Bolton* v. *Lancashire and Yorkshire Railway Company* (3). It is not at an end until the carrier has agreed to hold the goods as agent for the purchaser: *Coventry* v. *Gladstone* (4): *Whitehead* v. *Anderson* (5). In the present case a sufficient notice to stop was at any rate given on the 5th of August, and at that time the greater portion of the cargo was still in the custody of the master of the ship as carrier. Subject, therefore, to satisfying the claim of the bank, the vendor was entitled to the purchase-money of the sub-purchasers which was then unpaid: *Spalding* v. *Ruding* (6); *Ex parte Golding Davis & Co.* (7).

Benjamin, Q.C., *Watkin Williams*, Q.C., and *G. W. Lawrance*, for the trustee:—

A valid notice to stop goods *in transitu* can only be given to the actual immediate custodian of the goods, *i.e.*, if the goods are on board a ship, to the master of the ship. The decision in *Litt* v. *Cowley* (8) has been misunderstood. The ground of the decision there was that the notice given to *Pickford's Manchester* house had in fact reached their *London* house. But in *Whitehead* v. *Anderson* the principle is laid down that the notice, to be effectual, must be given to the person who has the actual custody of the goods, or, at any rate, if the notice is given to the principal whose servant has the custody of the goods, it must be given under such circumstances that he can by the exercise of reasonable diligence prevent the delivery of the goods. Why should a shipowner be bound to spend money in telegraphing to the master? The vendor can just as well telegraph to the master himself. The cases referred to as to the use of the telegraph were cases in which there was a duty to give a notice as early as possible. In such

(1) 6 East, 614.
(2) 2 M. & W. 623.
(3) Law Rep. 1 C. P. 431.
(4) Ibid. 6 Eq. 44.
(5) 9 M. & W. 518.
(6) 6 Beav. 376.
(7) 13 Ch. D. 628.
(8) 7 Taunt. 169.

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cases, if there was a telegraph, there might well be a duty to use it. But in the present case there was no duty on the shipowners to communicate to the master the notice which they had received.

That being so, the only notice on which the Appellant can rely is the notice which was given to the master on the 5th of August. But the transit was then at an end, for delivery orders had been handed to the sub-purchasers. The Act 40 & 41 Vict. c. 39 makes a delivery order as effectual as a bill of lading.

[BAGGALLAY, L.J.:—The orders were to weigh and deliver.]

The order to weigh was by the shipowner to the master; it was not a weighing as between the purchaser and the sub-purchasers. When the delivery orders were given to the sub-purchasers the original purchaser had lost all control over the goods, and the original vendor had lost his right to stop the goods *in transitu.*

[BRAMWELL, L.J.:—It is not disputed that the goods themselves could not have been stopped. The question is whether there could not be an equitable stoppage of the price which was to be paid by the sub-purchasers?]

Lickbarrow v. *Mason* (1) shews that the vendor of goods may, by an assignment of the bill of lading to a *bonâ fide* transferee, defeat the vendor's right to stop them *in transitu.* In *In re Westzinthus* (2) it was held that, when the transfer of the bill of lading amounted only to a charge or pledge, the unpaid vendor was deprived of his right to stop *in transitu* only to the extent of the charge; and the decision in *Spalding* v. *Ruding* (3) was to the same effect.

[JAMES, L.J.:—It was held that the equity of redemption could be stopped.]

In the present case the subsale amounted to a complete transfer of the property in the goods, both legal and equitable, and there was by the attornment of the master a complete delivery of the goods to the sub-purchasers before the notice to stop was given. In such a case it has never been held that the original vendor can

(1) 2 T. R. 63; 6 East, 21; Sm. L. C. 8th Ed. vol. i. p. 753.
(2) 5 B. & Ad. 817.
(3) 6 Beav. 376.

have any right as against the sub-purchaser's purchase-money, unless, indeed, *Ex parte Golding Davis & Co.* (1) be an authority for so holding. There are, no doubt, some *dicta* to that effect in the judgments delivered in that case, but the actual decision may be supported on another ground. The report shews that the vendors in that case had done nothing to assent to the shipping of the goods in the name of the sub-purchaser; they had, in fact, never given up the possession of the bills of lading. A vendor of goods has a right to have the bill of lading made out in his own name; *Turner* v. *Trustees of Liverpool Docks* (2); *Ogg* v. *Shuter* (3).

It is clear also from *Berndtson* v. *Strang* (4) that the right to stop *in transitu* will not be extended beyond the goods themselves. There it was held that it did not extend to the money received by the purchaser under a policy of insurance for the goods.

It is always a question of intention whether a delivery of part of a cargo amounts in law to a delivery of the whole; *Slubey* v. *Heyward* (5); *Hammond* v. *Anderson* (6); *Crawshay* v. *Eades* (7); *Tanner* v. *Scovell* (8). In the present case it must be assumed that the freight had been paid, or that the shipowners gave up their lien for freight, as they assented to an unconditional delivery of the goods to the sub-purchasers.

[JAMES, L.J.:—It does not appear from the agreed statement of facts whether the freight had been paid. I should infer that, if it had been paid, such a material fact would not have been omitted from the statement.]

In *Ex parte Cooper* (9) there was a distinct lien for freight, but surely the delivery orders would not have been given if the freight had not been paid.

JAMES, L.J.:—

The first question is, Was the transit still continuing at the time when the notice to stop *in transitu* was given by the vendor

(1) 13 Ch. D. 628.
(2) 6 Ex. 543.
(3) Law Rep. 10 C. P. 159.
(4) Ibid. 3 Ch. 588.
(5) 2 H. Bl. 504.
(6) 1 B. & P. (N.R.) 69.
(7) 1 B. & C. 181.
(8) 14 M. & W. 28.
(9) 11 Ch. D. 68.

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to the master of the ship, so that if there had been no sub-sale the vendor would still have had a legal right to stop the goods *in transitu?* I am of opinion that the transit was not at an end by reason of the partial delivery of the cargo which had taken place, that is to say, neither the obligations nor the rights of the shipowners as carriers had been determined by what they had done. They were still liable in the character of carriers for the safe custody of the goods, and the delivery of them to the person who was entitled to them, and they would have had a right to say, We will not deliver another maund of salt until we have been paid our freight. That being so, the *transitus* was not at an end, and the goods remained in the possession of the master as carrier; he had not attorned to any one; and, if that be so, a notice was given which would have been effectual to stop the goods *in transitu* as against the original purchaser. And, if so, the case is governed by the decision of this Court in *Ex parte Golding Davis & Co.* (1). Whether that decision was right or wrong, it appears to me that it is binding upon us, and it is not the less binding upon me because I was a party to it. It is a decision of the Court of Appeal, and it is not open to be reheard merely because the Court now consists in part of the same Judges. It appears to me that it is impossible to distinguish between the present case and *Ex parte Golding Davis & Co.*

BAGGALLAY, L.J. :—

I am of the same opinion. I think that the question is simply whether the transit was at an end when the notice of stoppage was given. It appears to me that it was not. The goods had been only partially delivered; they were in process of delivery. When that question is determined the principle of our decision in *Ex parte Golding Davis & Co.* at once applies. No doubt an unpaid vendor's right of stoppage *in transitu* cannot be exercised so as to prejudice the rights of third persons, but in the present case the rights of the sub-purchasers will be fully protected. I think, therefore, that the Appellant is in the right. I desire to add that the doubts which, in *Ex parte Golding Davis & Co.*, I said that I

(1) 13 Ch. D. 628.

had entertained during the argument turned entirely upon the special circumstances of that case. My doubt was whether the goods had not been delivered at *Liverpool* to *Knight & Son* and then started on a fresh *transitus*. Upon consideration I was satisfied that that was not the right view of the facts.

BRAMWELL, L.J.:—

I am of the same opinion. I think that there was no effectual stoppage *in transitu* until the master of the ship was told by the vendor's agents to stop the goods. I think that what took place at *Liverpool* amounted only to telling some one to stop the goods, not to a stoppage *in transitu*, and I cannot think that any duty was imposed on the shipowners at *Liverpool* to stop the goods. It seems to me that it would be monstrous to hold that the telling somebody else to stop goods *in transitu* amounts to a stoppage *in transitu*. But I am of opinion that the notice given to the master of the ship on the 5th of August would have been effectual as a stoppage *in transitu* if there had been no sub-purchaser. The master was then in possession of goods as carrier; he had not performed the whole of his duty in that character, and he had not lost his lien on the goods for the freight. Mr. *Benjamin* was obliged ingeniously to invent a new contract between the master and the sub-purchaser constituted by the delivery orders. I am of opinion that there was no such new contract. With regard to the cases which have been referred to upon what is called constructive delivery, it seems to me that, if there is not a delivery of the whole of a cargo, it had better not be deemed to be a delivery of the whole. I cannot understand the case of *Slubey* v. *Heyward* (1), because it appears that the sub-purchaser had paid for the goods, and on what ground there could be a stoppage *in transitu* as against him I am at a loss to see. The note of the case is a very loose one. The Court seems to have held that which, with great submission, appears to me a very doubtful proposition, that the carrier's duty had come to an end. As to *Hammond* v. *Anderson* (2), there is not a word in the judgments about delivery of part of the cargo being a constructive delivery of the whole. What Sir *James*

(1) 2 H. Bl. 504. (2) 1 B. & P. (N.R.) 69.

C. A. 1880 *Ex parte* FALK. *In re* KIELL.

Mansfield, C.J., said was this (1): "On a former occasion the Court decided that when a part of the goods sold by an entire contract was taken possession of, the vendee had taken possession of the whole." But with regard to the case then before the Court he said (1): "So much having been taken away and the whole having been weighed by the bankrupt, it is insisted that the bankrupt had taken possession of the whole . . . As to those bales which were sent away, the bankrupt had taken actual possession, and therefore no question can arise; and when it is admitted that he had taken possession of a part, how can it be said that he had not taken possession of the whole? The price was entire, and the whole to be paid for by one bill." The effect of the decision is shewn by the short judgment of *Rooke*, J., who said (2): "The facts of the case are too strong to be got over. The whole of the goods was paid for by one bill; a general order was given for the delivery of the whole, and the purchaser under that order went and took away a part; how could he more effectually change the possession?" It was a delivery of the whole cargo, because the wharfinger was holding the whole for the purchaser as his bailee and with a duty to him. I think, therefore, that in the present case there was not an end of the *transitus* before the notice of stoppage was given to the master on the 5th of August. Then arises the question whether, there having been a subsale of the goods, the stoppage *in transitu* can prevail. In one sense it must be admitted that no right in the goods remained in *Kiell* after the subsale, though he might still have stopped them *in transitu* as against his sub-purchasers. If there is any reason at all in the thing, and I think there is—for suppose *Kiell* had not become a bankrupt, but had been insolvent, would there have been anything unreasonable in the law interfering and saying to him, Your sub-purchaser's purchase-money shall not get into your hands, but shall go to pay your vendor?—what difference can it make that the purchaser has become a bankrupt? If the right of stoppage *in transitu* is ever to be exercised, I can see nothing unreasonable in its being exercised in such a case against the sub-purchaser's purchase-money. But there is the decision in *Ex parte Golding Davis & Co.* (3), which seems to me to be exactly in

(1) 1 B. & P. (N.R.) 71. (2) 1 B. & P. (N.R.) 72.
(3) 13 Ch. D. 628.

point. I am not going to shelter myself under the authority of that case. In my opinion it was rightly decided. What difference is there in principle between the case of a man selling goods on credit for £500 and their being then resold for £600, and the case of the purchaser pledging the goods for £600 with a right of sale by the pledgee? Why, if the vendor can stop the proceeds of sale in the one case, should he not have a right to stop them in the other? What injury is there to the sub-purchaser? The decisions in *In re Westzinthus* (1) and *Spalding* v. *Ruding* (2) seem to me to be applicable both to *Ex parte Golding Davis & Co.* (3), and to the present case. The appeal must succeed.

G. W. Lawrance asked for leave to appeal to the House of Lords.

JAMES, L.J.:—

Certainly. I think this is just the case in which such an application is reasonably and properly made.

BRAMWELL, L.J.:—

The decision in *Ex parte Golding Davis & Co.* was a novelty.

Solicitors for Appellants: *Field, Roscoe, & Co.*, agents for *Bateson & Co., Liverpool.*

Solicitors for Trustee: *Ashurst, Morris, & Co.*

(1) 5 B. & Ad. 817. (2) 6 Beav. 376.
(3) 13 Ch. D. 628.

C. A.
1879
C. J. B.
Aug. 4, 5.
Dec. 15.
C. A.
1880
May 13, 14.

17 Ch D 449
25 Ch D 46

Ex parte SIDEBOTHAM. *In re* SIDEBOTHAM.

Appeal—Locus Standi—"Person aggrieved"—Refusal of Court to act on Report by Comptroller in Bankruptcy of Misfeasance of Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 20, 57, 71—*Bankruptcy Rules*, 1870, *r.* 251.

When the Court has refused to act on a report by the Comptroller in Bankruptcy that the trustee in a bankruptcy has been guilty of a misfeasance, neglect, or omission, by which the estate has sustained a loss which the trustee ought to make good, neither the bankrupt nor any of the creditors is entitled to appeal from the refusal.

The Comptroller alone is entitled to appeal.

Ex parte Ditton (1) explained.

If the trustee has been guilty of a misfeasance, either the bankrupt or any of the creditors is entitled to make an application of his own to the Court under sect. 20, and, if the person so applying is dissatisfied with the order made, he has a right to appeal from it.

NATHAN SIDEBOTHAM and *James Marsh*, who carried on business in partnership at *Ashton-under-Lyne* as the *Barnfield Ironworks Company*, were adjudicated bankrupts in the *Ashton* County Court on the 21st of November, 1873. The proceedings were afterwards transferred to the *Manchester* County Court.

On the 6th of March, 1879, the Comptroller in Bankruptcy made a report to the Court, in which he stated that complaint had been made to him by several creditors of the bankrupts that the trustee in the bankruptcy had not faithfully performed his duties, and had not duly observed the requirements imposed on him by the statute, rules, and otherwise; that the trustee and other persons had been examined on oath; that the Comptroller had inquired into the matters complained of, and had required the trustee to answer certain requisitions; and that he had called upon the trustee to make good an alleged loss to the bankrupts' estate, and the trustee had failed to comply with such requisitions, but had tendered an explanation of the manner in which he had dealt with the estate, contending that he had realized the full value thereof. The report further stated that the Comptroller was of opinion that the explanations and contentions of the trustee were not

(1) 11 Ch. D. 56

satisfactory. And the Comptroller reported to the Court that the trustee had (*inter alia*) failed to comply with a requisition to credit the estate with a sum of £1253, being the loss which, in the opinion of the Comptroller, the estate of the bankrupts had sustained by the misfeasance, neglect, or omission of the trustee.

The debts of the bankrupts amounted to about £2200; the trustee had realized assets to the extent of about £1200.

Upon this report the Comptroller applied to the County Court to enforce the requisitions with which the trustee had not complied. The Judge refused to make any order in relation to the sum of £1253 mentioned in the report. The Comptroller did not appeal from this refusal, but the bankrupt *Sidebotham*, who had not obtained an order of discharge, appealed to the Chief Judge.

The appeal came on for hearing on the 4th and 5th of August, 1879.

E. Cooper Willis, for the Appellant:—

The bankrupt is a "person aggrieved" by the order within the meaning of sect. 71, and has a right to appeal from it. If the trustee had accounted for the £1253, the estate could have paid 20*s.* in the pound.

S. Taylor, for the trustee:—

The Appellant, being an undischarged bankrupt, has no *locus standi* to appeal: *Ex parte Sheffield* (1). Whether the Comptroller himself could or could not appeal, at any rate no one else but a creditor could do so: *Ex parte Ditton* (2).

BACON, C.J., ordered that the trustee should forthwith call a meeting of the creditors for the purpose of considering the report of the Comptroller, and the several matters arising therein, and of passing such resolutions in relation thereto as the meeting might think fit, including the question of the removal of the trustee and committee of inspection and the appointment of an additional or new trustee and committee, and for taking such steps (if any) in reference to the matters aforesaid as might be resolved upon.

(1) 10 Ch. D. 434. (2) 11 Ch. D. 56.

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And the further consideration of the appeal was ordered to stand over.

A meeting of the creditors was accordingly held on the 14th of November, 1879, when (*inter alia*) a resolution was passed by a majority in value of the creditors present, that the meeting, having considered the report of the Comptroller, was of opinion that the conclusions arrived at by him were perfectly justifiable upon the facts of the case, and desired to express their entire satisfaction with that report, and required the trustee to submit to the report, and to bring in and pay to the creditors of the estate the money therein required to be paid by him. Resolutions were also passed by a majority in number and value of the creditors present removing the trustee and the committee of inspection, but they were not passed by the proper majority of three-fourths in value.

The appeal came on again for hearing on the 15th of December, 1879.

E. Cooper Willis, for the Appellant.

Winslow, Q.C., and *S. Taylor*, for the trustee.

Abrahams, for the Comptroller.

BACON, C.J.:—

What can I do with this appeal? I sent it back on the last occasion to have a meeting of the creditors held, because I did not think that the bankrupt had any *locus standi* to appeal. I desired that the opinion of the creditors should be taken at a meeting. That meeting has been held, and resolutions have been passed agreeing with the report of the Comptroller; and that is all. I had hoped that the views of the creditors would have led them to take other steps, and to make themselves parties to the appeal. My intention was that the creditors, if they thought it right that proceedings should be taken, should appeal themselves. It is a matter which concerns them, and not the bankrupts. It would be a most pernicious course if I were to permit a bankrupt to come after a period of six years, after all these transactions, to ransack

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them, and take his chance of persuading the Court that what had been done had been done wrongly. The proper tribunal to entertain the Comptroller's report was the County Court Judge. The Comptroller went to him, and his judgment was clear and express. He declined to make the order suggested by the Comptroller's report. The meeting has taken place, and the creditors allow the matter to remain just where it was, simply supporting in so many words the statements of the Comptroller. There is no plaintiff, no appellant, no one to whom I can listen to-day. The Comptroller himself is not before me.

Abrahams:—I appear for the Comptroller, who thinks he has no *locus standi* to appeal.

BACON, C.J.:—Perhaps not, but as an officer of the Court I should listen to anything he might have to say. I have no parties properly litigant before me. The creditors have omitted to take advantage of the opportunity which I gave them of personally undertaking the appeal. The trustee has a right to have some one to look to other than the bankrupt, in the event of the appeal falling through. The County Court Judge has expressed a clear opinion; he had the Comptroller's report before him, and the evidence recited in his order, which he fully considered, and he held judicially that there was no pretence for saying that there had been any misfeasance, neglect, or omission on the part of the trustee. That is his judgment, and I have nothing before me to lead me to alter it. I have no one before me at whose instance the appeal can be prosecuted. The bankrupt has no *locus standi*, and none of the creditors have troubled themselves to prosecute it. It was right that the Comptroller should make these inquiries; they were, in my opinion, of the greatest importance. But I can only dismiss the appeal.

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From this decision the bankrupt *Sidebotham* appealed. The appeal was heard on the 13th of May, 1880.

Ambrose, Q.C., and *E. Cooper Willis*, for the Appellant:—

The Appellant is a "person aggrieved" by the refusal of the Court to act on the Comptroller's report. If the trustee had been

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ordered to pay the £1253 the estate would have paid a dividend of more than 10s. in the pound, and then, under sect. 48, the Appellant would have been entitled to his discharge. Indeed, the order which the Chief Judge made in the first instance implied that the bankrupt had a *locus standi* to appeal, for otherwise the appeal ought to have been dismissed at once. If he is not entitled to appeal as a "person aggrieved" under the general words of sect. 71, he has under sect. 20 a special right to apply to the Court in such a case as this (1).

[JAMES, L.J.:—If a dividend of 10s. in the pound might have been paid, except through the negligence or fraud of the trustee,

(1) Sect. 20 provides that "The bankrupt, or any creditor, debtor, or other person aggrieved by any act of the trustee, may apply to the Court, and the Court may confirm, reverse, or modify the act complained of, and make such order in the premises as it thinks just."

Sect. 55 provides that "The trustee having had his quarterly statement of accounts audited by the committee of inspection, shall, within the prescribed time, forward the certified statement in the prescribed form to an officer to be called the Comptroller in bankruptcy, and if he fail to do so he shall be deemed guilty of a contempt of Court to be punishable accordingly."

Sect. 56: "Every trustee of a bankrupt shall from time to time, as may be prescribed, and not less than once in every year during the bankruptcy, transmit to the Comptroller a statement shewing the proceedings in such bankruptcy up to the date of the statement containing the prescribed particulars, and made out in the prescribed form; and any trustee failing to transmit accounts in compliance with this section shall be deemed guilty of a contempt of Court, and be punishable accordingly."

Sect. 57: "The Comptroller shall examine the statements transmitted to him, and shall call the trustee to account for any misfeasance, neglect, or omission which may appear on such statements, and may require the trustee to make good any loss the estate of the bankrupt may have sustained by such misfeasance, neglect, or omission. If the trustee fail to comply with such requisition of the Comptroller, the Comptroller may report the same to the Court; and the Court, after hearing the explanation, if any, of the trustee, shall make such order in the premises as it thinks just."

Rule 251: "The Comptroller shall take cognizance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute, rules, or otherwise, relative to the performance of his duties, or in the event of any complaint being made to the Comptroller by any creditor in regard thereto, he shall inquire into the same, and, if not satisfied with the explanation given, he shall report thereon to the Court, which, after hearing the trustee, may remove him from his office, or otherwise make such order in the matter as the justice of the case may require."

the bankrupt has, under sect. 48, the same right to his discharge as if it had been paid.

BRAMWELL, L.J.:—But in the absence of the report of the Comptroller the bankrupt would have to prove the negligence or fraud of the trustee.]

It is the interest of the bankrupt that his estate should pay as large a dividend as possible. There are some debts from which he is not released by the order of discharge: sect. 49.

Winslow, Q.C., and *S. Taylor*, for the trustee:—

Under the old bankruptcy law an uncertificated bankrupt could not petition that his assignees might be ordered to account, without alleging that his estate would produce a surplus: *Ex parte Ryley* (1). The present *Bankruptcy Act* has not altered this rule. Section 20 refers to the case of a bankrupt who is personally aggrieved by an act of the trustee; it does not apply to the present proceeding. An undischarged bankrupt has no property in the possible surplus of his estate: *Ex parte Sheffield* (2). The dismissal of the present appeal would not prevent the bankrupt from shewing, on an application for his discharge, that the failure to pay 10*s.* in the pound had been caused by the fault of the trustee. If the bankrupt has a right to appeal he must have been equally entitled to be heard in the first instance upon the application of the Comptroller to the County Court. The Comptroller's application was made under sect. 57. That section gives a right to the Comptroller to apply to the Court, but it gives no right to the bankrupt. If the Comptroller had not reported to the Court that the trustee had failed to comply with his requisitions, surely no one else could have done so.

[JAMES, L.J.:—In *Ex parte Ellis* (3), an adjudication of bankruptcy having been made upon the execution of a bill of sale by the bankrupt as an act of bankruptcy, we held that the grantee of the bill of sale was entitled to appeal from the adjudication, because if the bill of sale was an act of bankruptcy his title to the

(1) 4 Deac. & Ch. 50. (2) 10 Ch. D. 434.
(3) 2 Ch. D. 797.

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property was destroyed. In the present case you say the bankrupt is seeking to appeal when he has not been a litigant.]

In rule 251 creditors are mentioned, but the bankrupt is not.

[JAMES, L.J., referred to *Ex parte Learoyd* (1).]

Suppose the Comptroller is satisfied with the decision of the Judge, why should the undischarged bankrupt or any one else have a right to interfere?

[BRAMWELL, L.J.:—Either the Comptroller can appeal or he cannot. If he cannot, can any one else? If he can, is it conceivable that the Legislature should have intended to give the right of appealing to any one else?]

Ambrose, in reply:—

Ex parte Ryley (2) has no application.

[JAMES, L.J.:—The real question is whether a man who did not choose to make an application of his own to the County Court can become an appellant from the refusal of an application made by the Comptroller.]

Ex parte Ditton (3) shews that a creditor could appeal from such a refusal; and in *Ex parte Walter* (4) it was held that a creditor who had not been previously heard on the question of the registration of liquidation resolutions was entitled to appeal from the order which had been made.

The ground of the decision in *Ex parte Sheffield* (5) was that the bankrupt was not entitled, by assigning the surplus of his estate by way of security, to embarrass the administration of the estate by giving a stranger the right to interfere. The object of giving the power to the Comptroller was to prevent a multitude of applications, but, if the Comptroller declines to proceed, why should not any of the persons who are interested take up the matter?

JAMES, L.J.:—We must take time to consider our judgment. It is a very important question what limits are to be imposed on the term "person aggrieved" in sect. 71.

(1) 10 Ch. D. 3.
(2) 4 Dea. & Ch. 50.
(3) 11 Ch. D. 56.
(4) 2 Ch. D. 326.
(5) 10 Ch. D. 434.

May 14. JAMES, L.J.:—

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Since this case was argued yesterday we have had an opportunity of considering it, and we have arrived at the conclusion that the preliminary objection must prevail as it did before the Chief Judge. When one comes to consider the sections of the Act which provide for the audit of the trustee's accounts and for what the Comptroller is to do, it seems clear that a proceeding taken under it by the Comptroller does not raise anything like a *litis contestatio*. Neither the trustee nor the Comptroller stands in the position of a litigant. The Comptroller is to make a representation to the Court, and if he does so, and the trustee does not give a satisfactory explanation, whatever the Court does upon that it really does *ex mero motu*. It is not a lawsuit either in form or in substance between the Comptroller and the trustee. The trustee, of course, would be entitled to appeal from the order of the Court if he thought it unjust. But, the Judge having come to a conclusion, rightly or wrongly, that he ought not to make any order on the Comptroller's report, there ought not to be any appeal from his decision. There is nothing to form the ground of an appeal. It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something. In *Ex parte Ellis* (1) we held that where an adjudication of bankruptcy had been made, founded upon the execution of a bill of sale as an act of bankruptcy, the holder of the bill of sale was a "person aggrieved" by the adjudication, and was entitled to appeal from it because it affected his property. And in *Ex parte Walter* (2) we held that a creditor who had not been heard before the Registrar on the question of the registration of liquidation resolutions was entitled to appeal from the Registrar's order, because the question of the registration or non-registration of such resolution is one which

(1) 2 Ch. D. 797. (2) 2 Ch. D. 326.

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affects the interests of all the creditors. In the present case no one is prejudiced by the refusal of the Court to act on the Comptroller's report, except in so far as he has lost any benefit which he might have obtained if an order had been made; there is nothing to embarrass him in any proceedings which he may wish to take against the trustee. If there has been any misfeasance on the part of the trustee, the bankrupt or any creditor has a right under sect. 20 to apply to the Court, not because the Comptroller has made a report to the Court, but because he is entitled to make his own case against the trustee. And that is really the course which ought to have been taken in the present case, and then the person who made the application would have been in the position of a litigant and would have had the right of appealing from any order which the Court might have made. In the present case, I am of opinion that the Appellant has suffered no grievance, he has hardly sustained even a *damnum;* if he has it is *damnum absque injuriâ.*

BAGGALLAY, L.J.:—

I entirely agree.

BRAMWELL, L.J.:—

I also agree. Upon an examination of sect. 57 it seems to me that the report of the Comptroller is a matter between him and the trustee; there is no decision or judgment or finding of the Court upon the report. I cannot see that any other person would have a right to attend the proceedings. Supposing that the Comptroller has a right to appeal from the refusal of the Judge to act upon his report, and he does not think fit to do so, is there to be an appeal by the bankrupt or by any of the creditors? Is the Comptroller to be satisfied, and yet is the bankrupt or any creditor to be entitled to appeal? I do not say that such a state of things is impossible, but certainly the general rule is that an appeal must be by the party who has endeavoured to maintain the contrary of that which has taken place. It is not so much that there is a disability on the part of the bankrupt to appeal, as that no one but the Comptroller is entitled to appeal. I come to this con-

clusion the more readily because under sect. 20 there can be a *litis contestatio* raised between the bankrupt and the trustee.

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JAMES, L.J.:—

I wish to add that in *Ex parte Ditton* (1) the question whether a creditor was entitled to appeal was not really argued. We stopped Mr. *Winslow*, who appeared for the trustee, on that point, and we only heard him on the question whether the Appellant should be allowed a further opportunity of proving his alleged debt. All that we decided was that a person who alleged himself to be a creditor, but who had not tendered any proof of debt, could not appeal.

Solicitors for Appellant: *Le Riche & Son*, agents for *James Gardner, Manchester.*

Solicitors for Trustee: *Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Co., Manchester.*

Ex parte RANBY. *In re* RANBY.

C. A. 1880 *June* 3, 10.

Court of Bankruptcy—Jurisdiction—Charges of Trustee—Taxation—Composition under sect. 28 *of Bankruptcy Act*, 1869—*Bankruptcy Rules*, 1870, *rr.* 108, 278.

The creditors of a liquidating debtor resolved on a liquidation by arrangement, and appointed a trustee and a committee of inspection, and they resolved that the remuneration of the trustee should be such as the committee of inspection should from time to time determine. Afterwards the creditors authorized the trustee to accept an offer made by the debtor, under sect. 28 of the *Bankruptcy Act*, 1869, to pay a composition, he also paying the costs, charges, and expenses of the solicitors, receiver, and trustee in relation to the settlement of his affairs and of the scheme of arrangement. The arrangement was approved by the Court:—

Held, that after the confirmation of this scheme the Court had jurisdiction to tax the trustee's charges, notwithstanding that his account had been audited and approved by the committee of inspection subsequently to the confirmation of the composition arrangement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

(1) 11 Ch. D. 56.

C. A. 1880 *Ex parte* RANBY. *In re* RANBY.

On the 25th of February, 1879, *Henry Ranby*, a draper at *Derby*, filed a liquidation petition in the *Derby* County Court, and on the next day *Samuel Hall* was appointed receiver of his property. The first meeting of the creditors was held on the 17th of March, when a liquidation by arrangement was resolved upon, and *J. A. Joselyne* was appointed trustee. A committee of inspection was also appointed, and it was resolved that the remuneration of the trustee should be such as the committee of inspection should from time to time determine. It was also resolved to transfer the proceedings to the *London* Court of Bankruptcy. On the 15th of April, 1879, a meeting of the creditors was held, in pursuance of a notice given by the trustee under sect. 28 of the *Bankruptcy Act*, 1869, when it was resolved that the trustee be authorized to accept an offer made to him by the debtor to pay to each of his creditors a composition of 6*s.* 8*d.* in the pound, in three instalments, to be secured by promissory notes as therein mentioned, "the debtor also paying or agreeing to pay or securing to be paid (before the date of the confirmation of the scheme) all costs, charges, and expenses of solicitors, receiver, and trustee incurred, or to be incurred, in relation to the settlement of his affairs and of this scheme, and of all preferential claims against the estate." It was also resolved that the discharge of the debtor should be granted to him so soon as he should have given effect to the foregoing resolution, and the same should have been certified by a memorandum in writing signed by the trustee, and that the liquidation should be closed and the trustee released from the date of the memorandum. This scheme was approved of and confirmed by an order of the Court on the 13th of May, 1879, and the promissory notes were afterwards delivered to the creditors in May, 1879. The trustee made out an account of the moneys which had come to his hands on account of the estate, and of the costs, charges, and expenses (including his own remuneration) which he claimed to retain, and on the 2nd of September, 1879, this account was audited and approved by the committee of inspection. The debtor was dissatisfied with the trustee's account, and alleged that some of the charges made in it were improper and excessive, and, after some correspondence with the trustee, he applied to the Court for an order directing that an

account might be taken of the receipts and disbursements of the trustee, and that such balance (if any) as might be found to be due from him might be ordered to be paid to the debtor. Upon this application the Registrar, on the 27th of January, 1880, ordered that it should be referred to the Taxing Master to tax the trustee's charges, and that the hearing of the motion should be adjourned *sine die*, with liberty for either party to apply to the Court. When the matter came before the Taxing Master he was of opinion that, having regard to rule 108 (1) of the Bankruptcy Rules, 1870, the account having been certified by the committee of inspection, he had no power to tax it. The Registrar then referred the matter to the Comptroller in Bankruptcy, and he took the same objection. The Registrar thereupon directed the motion to be reheard before himself, and on the 5th of March, 1880, he ordered that the motion should be dismissed without costs. The debtor appealed.

Hemming, Q.C., and *Finlay Knight*, for the Appellant:—

When the Registrar made his second order he was of opinion that he had no jurisdiction to tax the costs. He was mistaken in that view: *Ex parte Carew* (2); *Ex parte Lyons* (3).

Winslow, Q.C., and *E. Cooper Willis*, for the trustee:—

In *Ex parte Lyons* the trustee's account was settled by a deed, and the Court held that there was no jurisdiction to set the arrangement aside. An arrangement under sect. 28 is not like an ordinary composition under sect. 126 of the Act; it is really a sale of the estate to the debtor by the trustee. The arrangement did not deprive the committee of inspection of the powers which were originally conferred on them. In the present case the creditors, acting under rule 278, left the remuneration of the trustee to the committee of inspection, and the committee have not been deprived of their functions. But the real ground of the

(1) Rule 108: "Where no remuneration has been voted to a trustee, he shall be allowed out of the bankrupt's estate such proper costs and expenses as may be incurred by him in or about the proceedings of the bankruptcy, as the Taxing Master or Registrar shall allow."

(2) Law Rep. 10 Ch. 308.

(3) Ibid. 7 Ch. 494.

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Ex parte RANBY. *In re* RANBY.

Registrar's decision was that he had gone through the items of the account and was of opinion that the charges were proper.

JAMES, L.J.:—

The jurisdiction of the Court seems to me quite clear. The committee of inspection had no power to interfere after the composition had been accepted under sect. 28, and had been approved by the Court. But if the Registrar looked into the items of the account and came to the conclusion that there was no ground for objecting to them, we should not interfere with his decision. The matter must, therefore, stand over that we may ascertain what the Registrar really did.

COTTON and THESIGER, L.JJ., concurred.

June 10. JAMES, L.J.:—

The Registrar has reported to us that he decided only on the question of jurisdiction, and that he did not go into the items of the account. The matter must, therefore, be referred back to him. The costs will abide the result. The trustee will not be bound by the account which he has already rendered. We express no opinion as to what the Registrar ought to do with the account when he looks into it.

Solicitors for Debtor: *Berry & Binns*, agents for *W. Briggs, Derby.*

Solicitors for Trustee: *Phelps, Sidgwick, & Biddle.*

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[1879 R. 294.]

Partnership Articles—Power to expel Partner—Arbitration Clause—Charges of Fraud—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11—*Discretion of Court.*

Partnership articles between *A.* and *B.* provided that, if the business should not be conducted to the satisfaction of *B.*, he should have power to give notice to *A.* to determine the partnership; the articles also contained an arbitration clause providing that any differences in relation to the partnership should be referred to arbitration. *B.* having given notice to *A.* for the partnership to be determined, *A.* brought an action against *B.*, alleging various charges of fraud, and claiming that the notice should be declared void, and that *B.* should be restrained from announcing the dissolution of the partnership, whereupon *B.* moved that the matters in question should be referred to arbitration:—

Held, that the power to give the notice under the articles was exerciseable by *B.* at his own will and pleasure:

Held, also (*A.* having, in the judgment of the Court, failed to establish a *primâ facie* case of fraud), that the matters in question should be referred to arbitration according to the articles.

In a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a *primâ facie* case of fraud is proved.

Observations of *Wickens*, V.C., in *Willesford* v. *Watson* (1), questioned. *Blisset* v. *Daniel* (2) and *Wood* v. *Woad* (3) distinguished.

By articles of partnership, dated the 4th of October, 1876, and made between the Defendant, *W. A. Russell*, of the first part, *Robert Crawford* of the second part, and the Plaintiff, *Henry Russell*, a brother of the said *W. A. Russell*, of the third part, it was agreed that the said *W. A. Russell*, *R. Crawford*, and *Henry Russell*, should be and remain partners in business at *Manchester* and *Glasgow* for the term of seven years, subject to its sooner determination as thereinafter provided, under the name of *Russell Brothers & Crawford.*

The articles contained the following clause: "If at any time

(1) Law Rep. 14 Eq. 572. (2) 10 Hare, 493.
(3) Law Rep. 9 Ex. 190.

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during the said partnership the business thereof shall not be conducted or managed, or the results thereof shall not be to the satisfaction of the said *W. A. Russell*, it shall be lawful for the said *W. A. Russell* to give a notice in writing to the other partners or partner of his desire that the said partnership shall determine, or to leave such notice at or upon some part of the premises in *Manchester* where the partnership business shall for the time being be carried on, and also by sending such notice as a registered post letter addressed to the said firm at their office in *Glasgow*, and in such case the partnership shall cease and determine immediately on the expiration of three calendar months from the giving or leaving of such notice."

The articles also contained the following clause: "If, during the continuance of the said partnership or at any time afterwards, any difference shall arise between the said parties in regard to the construction of any of the articles herein contained, or to any decision, act, or thing to be made or done in pursuance thereof or to any other matter or thing relating to the said partnership or the affairs thereof, such difference shall be referred to arbitration" in manner therein provided, "and the award of the arbitrators or their umpire as the case may be shall be final and conclusive between the parties, and the submission or reference to such arbitration may, on the application of either of the parties, be made a rule of Her Majesty's Supreme Court of Judicature in *England*."

On the 31st of October, 1879, the Defendant, *W. A. Russell*, served the following notice upon the Plaintiff, and gave a like notice to the Defendant *Robert Crawford*:—

"To Messrs. *Robert Crawford* and *Henry Russell*.

"I hereby give you notice pursuant to the provision in this behalf contained in our articles of partnership dated the 4th day of October, 1876, that it is my desire that our partnership shall determine immediately on the expiration of three calendar months from the giving or leaving of this notice as in such articles of partnership provided."

On the 10th of December, 1879, the Plaintiff, *Henry Russell*, commenced his action against the Defendants *W. A. Russell* and *Robert Crawford*, making various charges of fraud against the

Defendants *Henry Russell* and *Robert Crawford*, and claiming a declaration that the notice of the 31st of October, 1879, was void and of none effect, and that the partnership of *Russell Brothers & Crawford* was still subsisting for the remainder of the said partnership term of seven years; and for an injunction to restrain the Defendants from publishing any announcement that the partnership had been dissolved.

The Plaintiff's allegations were supported by affidavit.

The charges of fraud contained in the statement of claim were denied by the Defendant *W. A. Russell*.

The Defendant *W. A. Russell* subsequently served the Plaintiff with a notice of motion that all matters in difference between the parties, including the matters in question, should be referred to arbitration, according to the provision in the articles; and, except for the purpose of enforcing such order as might be made on the motion, that all further proceedings in the action might be stayed.

Another notice of motion was served by the Plaintiff on both the Defendants that they might be restrained by injunction from advertising, or in any manner publishing or stating, that the partnership had been dissolved pursuant to the notice of the 31st of October, 1879.

Both motions now came on together.

Davey, Q.C., and *T. S. Osler*, in support of the Plaintiff's motion:—

Although the terms of the arbitration clause in the partnership articles are very wide, yet, when actual fraud is imputed, the Court will, under sect. 11 of the *Common Law Procedure Act*, 1854, refuse to enforce the reference, and will itself determine the question in dispute.

In *Willesford* v. *Watson* (1) Vice-Chancellor *Wickens* observes (2) that in cases of actual fraud the Court refuses to interfere.

Further, the Defendant *W. A. Russell*, in exercise of his power under the articles to give notice to the Plaintiff to determine the partnership, has acted capriciously. Such power must always be exercised fairly and on reasonable grounds, and after giving

(1) Law Rep. 14 Eq. 572. (2) Law Rep. 14 Eq. 577.

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notice to the person sought to be removed of the grounds upon which it is given. Thus, in *Blisset* v. *Daniel* (1), where articles of partnership contained a power for the holder of two-thirds or more of the partnership shares to expel any partner by notice under their hands, it was held that the power was not properly exercised without the knowledge and behind the back of the partner who was to be expelled, and without giving him the opportunity of stating his case and of removing any misunderstanding on the part of his co-partners.

Again, in *Wood* v. *Woad* (2), where the committee of an insurance society had power to exclude any member on giving him notice in writing, it was held that they could not exclude him without giving him an opportunity of being heard. The same principle was followed in *Steuart* v. *Gladstone* (3).

Chitty, Q.C., and *J. Beaumont*, for the Defendant *W. A. Russell*, and

Ince, Q.C., and *Langworthy*, for the Defendant *R. Crawford*, were stopped by the Court.

JESSEL, M.R.:—

The arbitration clause in this case is in terms sufficient to cover every dispute having any relation to the transactions between the partners, and it is clearly so expressed as to include the dispute in question. As to that there is no contest whatever. The only point that is in contest is whether it is a case in which the Court, having regard to the discretion given by the 11th section of the *Common Law Procedure Act*, 1854, ought in the exercise of that discretion to refuse to allow the matters which have been expressly agreed to be referred to arbitration to be so referred.

Now, of course that discretion was given because there might be cases in which it ought to be exercised, but, as a rule, I should say those cases are few and exceptional. As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public,

(1) 10 Hare, 493. (2) Law Rep. 9 Ex. 190.
(3) 10 Ch. D. 626.

which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful. If ever I could imagine a case to which that observation would emphatically apply it is the case before me.

The substantial litigants are brothers and partners, and the contest between them has assumed a very unpleasant phase, for the one brother accuses the other in terms both of constructive and of actual fraud, accusations which are denied by the other brother in very indignant terms, shewing to me that it is a case in which it would be most undesirable that these gentlemen should remain in partnership together. Also, it is a case in which it would be most desirable for the reputation, comfort, and happiness of both that these matters should be investigated by some impartial friend in the shape of an arbitrator rather than before a Judge in Court. If, therefore, I am not compelled by the course of judicial decision to say that I ought not to exercise my judicial discretion in saying that this is emphatically a case to be referred to arbitration, I should accede to the motion of the Defendant *W. A. Russell*, and the only thing which I have now to consider is whether there has been such a judicial construction put upon this clause of the Act of Parliament as to compel me so to exercise my discretion contrary to my opinion.

The only case which has been cited directly bearing upon the point is a case before Vice-Chancellor *Wickens* of *Willesford* v. *Watson* (1), in which, although the point was not decided by him because he thought it was a proper case in which to make the order to refer to arbitration, yet he says this (2): "Such orders have been very frequently made by Courts of Law. The construction which these Courts have put on the clause seems to have been that, whenever the agreement to refer covers the question which the action raises, the matter should be referred, even although it is properly one of law, and even though the defendant's case may be properly raiseable in a cross action; in fact, in all cases except where there is a question of actual fraud. In cases of actual fraud the Court refuses to interfere on two grounds: first, because when personal fraud is in issue the case is properly one of publicity, and for a jury; and secondly, because

(1) Law Rep. 14 Eq. 572. (2) Law Rep. 14 Eq. 577.

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the parties to a contract can hardly be supposed to have endeavoured to refer to a conventional tribunal any attempt by one of them to cheat the other. But in all other cases the Courts of Law seem to consider that the defendant is entitled to the reference when he once has shewn that the point is one which the plaintiff agreed to refer."

That is not a statement of the Vice-Chancellor's own judgment, but of what he understood to be the practice in the Courts of Law, and it is very singular that the industry of counsel has not furnished me with a decision at law laying down anything of the kind, and I am not at present aware from what source the Vice-Chancellor derived his conclusions.

Different minds are differently affected by a consideration of the same circumstances, but, speaking for myself, I am by no means persuaded that these reasons are sufficient, or that the Courts of Common Law have ever laid down that they are. First of all, is it true that the parties to a contract can hardly be supposed to have endeavoured to refer to an arbitrator an attempt by one of them to cheat the other? I can find no reason for assuming it. A fraudulent man would not desire publicity, but would wish the question to be inquired into before a private tribunal. Nor does it follow that the man who has been defrauded wants publicity. It is an injury to the credit of the firm. It is an injury to the reputation of a man who has been his partner, who may be connected with him not only by the ties of partnership, but, as in the case before me, by nearer and dearer ties. Why should it be necessarily beyond the purview of this contract to refer to an arbitrator questions of account, even when those questions do involve misconduct amounting even to dishonesty on the part of some partner? I do not see it. I do not say that in many cases which I will come to in the second branch of the case before the Court, the Court may not, in the exercise of its discretion, refuse to interfere; but it does not appear to me to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral misconduct to one or other of the parties.

I now come to the first ground, where personal fraud is in issue. Though I quite agree it is within the discretion of the Court to

say, where one of the two partners desires it, that a dispute shall not be referred to arbitration, yet I must consider for a moment which of the two partners does desire to exclude arbitration. Does the party charging the fraud desire it, or the party charged with the fraud desire it? Where the party charged with the fraud desires it, I can perfectly understand the Court saying, "I will not refer your character against your will to a private arbitrator." It seems to me in that case it is almost a matter of course to refuse the reference, but I by no means think the same consideration follows when the publicity is desired by the person charging the fraud. His character is not at stake, and the other side may say, "The very object that I have in desiring the arbitration is that the matter shall not become public. It is very easy for you to trump up a charge of fraud against me, and damage my character, by an investigation in public." There is a very old and familiar proverb about throwing plenty of mud, which applies very much to these charges made by members of the same family, or members of the same partnership, against one another in public. It must be an injury, as a rule, to the person charged with fraud to have it published, and I must say that I am by no means satisfied that the mere desire of the person charging the fraud is sufficient reason for the Court refusing to send the case to arbitration.

It may be that that must depend upon the circumstances of the case, not forgetting both the evidence before the Court when the motion is made, and the nature of the charge that is actually made. But I for one do not wish to countenance the doctrine that the mere fact of a partner, who has a contract in a deed to refer partnership disputes to arbitration, making a charge of fraud against a co-partner, is sufficient to prevent the co-partner insisting upon a reference to arbitration. As I conceive it, that rule ought only to be applied, as a matter of course, without investigating the circumstances, in cases where the person charged with the fraud desires the inquiry to be public.

I will now consider the circumstances of this case, and whether I ought to refuse to interfere. In the first place, I must clear away a point of law which was raised, and which appears to me not to apply to the present case.

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The case of *Blisset* v. *Daniel* (1) has been cited and commented upon, and also a case of *Wood* v. *Woad* (2). With regard to *Blisset* v. *Daniel* I have known it for years, but with regard to *Wood* v. *Woad*, I am sorry to say that my acquaintance with it has begun to-day. I must say it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than Judges who have judicial functions to perform, which I should have been very glad to have had before me in both of those club cases that I recently heard, namely, the case of *Fisher* v. *Keane* (3), and the case of *Labouchere* v. *Earl of Wharncliffe* (4). The passage I mean is this, referring to a committee (5): "They are bound, in the exercise of their functions, by the rule expressed in the maxim, *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." I am very glad to find that that eminent Judge has arrived at the same conclusion which I arrived at independently, but I should have been still more glad had I been able to fortify my conclusion by citing this, which I may call a most admirably-worded judgment.

Now one must consider what *Wood* v. *Woad* was, to shew how different it is from this case. *Wood* v. *Woad* was in effect this: there was a rule which allowed a committee of a mutual insurance society to expel a member, and the ground was, "that if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member." Consequently by excluding him the committee declare to the world, to all his neighbours and friends, and to all the other members of the society in particular, that they "deem" his conduct suspicious, and for some reason that he

(1) 10 Hare, 493.
(2) Law Rep. 9 Ex. 190.
(3) 11 Ch. D. 353.
(4) 13 Ch. D. 346.
(5) Law Rep. 9 Ex. 196.

is unworthy to remain in the society. By the very act of excluding him they cast a stigma upon him. Then, remembering that, I have to say a word as to the use of the word "deem." That word has more than one meaning, but one of its meanings is to adjudge or decide. In fact, the old word "deemster" or "dempster" was the name for judge. To "deem" at one time meant to decide judicially. Consequently, taking that meaning, what they had to do was to "deem" that the member's conduct was suspicious, and such as made him unworthy. That was in fact a decision not merely depending upon opinion, but depending on inquiry. No one could suppose it was to be left to the caprice of the members of the committee to stigmatise as dishonourable or dishonest any member of the society. Of course it was not. It was intended that they should be satisfied by something like reasonable evidence that his conduct was unworthy. Therefore, in construing the rule, the Court of Exchequer came to the conclusion, and, if I may say so, I think rightly came to the conclusion, that it was a case in which the committee ought not to have decided until after inquiry. That case, therefore, has no bearing upon the question as regards the partnership right to give notice to one partner to dissolve. It is a case of a totally different kind.

As regards *Blisset* v. *Daniel* (1), that was a very peculiar case. The case there was this: a majority of the partners consisting of two-thirds wished to expel a partner, and nothing more, but if they did expel him, the other partners had a right to buy up his shares in a particular way by valuation. All the Vice-Chancellor decided was this, that in a case of that kind they had no right to expel merely for the purpose of buying up the shares, and that it was not a fair and *bonâ fide* exercise of the power. He decided that the partners were not to meet together and say, "We should like to have so-and-so's shares, and, therefore, we will expel him." That was a consequence of the expulsion, but it was not to be the motive of the expulsion—it was not a *bonâ fide* exercise of the power. Then they alleged that they had grounds of dissatisfaction with the partner, but his reply in effect was, "If you have any ground of dissatisfaction you ought to have given me notice to see if I had anything to answer."

There the Vice-Chancellor was of opinion that even in that

(1) 10 Hare, 493.

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limited case, where it was only *inter se* as regards the partners themselves, yet, if the reason, as far as the other partners were concerned, was misconduct, they ought to give the partner sought to be expelled an opportunity of explaining his alleged misconduct. How that case applies to the case of a single partner I do not well understand. In the case of several partners it may well be that it is a thing to be considered, but if it is a single partner it is plain that neither *Blisset* v. *Daniel* (1) nor *Wood* v. *Woad* (2) has any application, because the moment you give the power to a single partner in terms which shew that he is to be sole judge for himself, not to acquire a benefit, but to dissolve the partnership, then he may exercise that discretion capriciously, and there is no obligation upon him to act as a tribunal, or to state the grounds on which he decides for himself.

It appears to me, upon examining these clauses, that this is clearly a power which may be exercised capriciously if one single partner thinks fit. The sole ground of the other decisions, that it was a power given to a number of persons not to be exercised capriciously, of course disappears when you have a power given to a single person which could be exercised capriciously.

The words of the power are in these terms: "If at any time during the said partnership the business thereof shall not be conducted or managed, or the results thereof shall not be to the satisfaction of the said *W. A. Russell*, it shall be lawful for the said *W. A. Russell* to give a three months' notice in writing." That is not a question of personal character or conduct in which he can summon a person to explain. It is not, "If the conduct of the said *Henry Russell* shall not be satisfactory," but it is simply, "If the business shall not be managed or conducted, or the results thereof shall not be to the satisfaction of the said *W. A. Russell*." The "results" mean this: there may be a very large profit, but he may not think it large enough, and the result may not be satisfactory to him. How can anybody say that that is anything but a capricious power, that is, a power which he may exercise at his own will and pleasure?

The allegation in the statement of claim is, that there has been nothing in the management or the results which would be otherwise than satisfactory. How can I tell that? That depends on the

(1) 10 Hare, 493. (2) Law Rep. 9 Ex. 190.

state of the man's mind. Some men are never satisfied, nothing will satisfy them. It would be no answer to say that he ought to be satisfied because they had got 40 or 50 per cent. profit. He might say, "That is not enough, I want more." It is plainly a power which puts it entirely within the right of *W. A. Russell* to say, "I am not satisfied, although all the world except myself would be satisfied with such a result." In other words, it is a power which he may exercise at his will and pleasure, capriciously or not capriciously, as he thinks fit, and to my mind the cases cited have not any bearing whatever. He need not make any inquiry. He need not call upon the partners for explanation; it is open to him to say, "I am not satisfied"; and there is an end of it.

Then I come to the allegations of fraud, and I am very sorry to see that they were made.

[His Lordship then considered the allegations in the statement of claim, which he considered to be allegations of actual personal fraud.]

The next question I have to consider is, what foundation there is for the charges, because, if the mere making of a charge of fraud would entitle the person making it to call upon the Court, in the exercise of its discretion, to refuse to refer to arbitration, there would be a very easy way of getting rid of all these clauses of arbitration. I am satisfied that the mere making of a charge will not do that, even in a case where the Court ought to exercise its discretion by refusing to refer the case to arbitration. There must be sufficient *primâ facie* evidence of fraud, not conclusive or final evidence, because it is not the trial of the action, but sufficient *primâ facie* evidence.

Now I am very sorry to say, although this is an accusation brought by one brother against the other, I can find no evidence at all, but there is an affidavit by the Plaintiff stating the circumstances I have mentioned together with some others, and then winding up with that which is not evidence, but which is statement of belief, sufficient on a motion of this kind to call upon the party for a denial, but useless for any other purpose.

[His Lordship, after referring to the affidavits on both sides, continued:—]

Consequently the fraud is not proved, and there is no *primâ*

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facie proof of it, and I myself do not consider the other circumstances stated in the affidavit amount to any evidence whatever of the fraud which is alleged in the statement of claim as a ground for relief and for setting aside the notice which has been given by the Defendant *W. A. Russell.*

I consider, therefore, that whether or not there may be a case in which, at the instance of the person charging fraud, the Court can properly refuse to refer the matter to arbitration, there is no such *primâ facie* case of fraud made out as ought to influence the Court, and therefore I think I ought to grant the Defendant's motion.

The order will be, that the Plaintiff's motion for an injunction be refused: the costs of the motions to be costs in the action: the action and the costs, and all matters in dispute, to go to arbitration.

Solicitors for Plaintiff: *Field, Roscoe, & Co.*, agents for *Atkinson, Saunders, & Co., Manchester.*

Solicitors for Defendants: *Learoyd, Learoyd, & Peace.*

M. R. 1880 *Feb.* 24.

RIGBY *v.* CONNOL.

[1878 R. 6702.]

Trade Union—Expulsion of Member—Claim to participate in Property and Benefit of the Union—Restraint of Trade—Illegal Association—Trades Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.

The foundation of the jurisdiction of the Court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he is deprived.

The rules of a trade union provided that the money arising from the subscriptions of its members should be applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, and provided that any journeyman binding his son in a "foul shop" (being a shop in which non-union men were employed) should be fined, and not be entitled to any benefit until such fine had been paid. The Plaintiff, a member of the union, who was alleged to have broken the rule as to apprenticeship, and who, having refused to pay the fine, had been expelled from the union, brought his action against the committee and trustees of the union claiming

to be entitled to participate in its benefits, and that the Defendants might be restrained from excluding him from such participation:—

Held, that as the action was brought to enforce an agreement between members of a trade union "to provide benefits to members," within the meaning of the *Trades Union Act*, 1871, s. 4, which the Court was not by that section enabled to enforce; and as, apart from the Act, the union was an illegal association, the Plaintiff was not entitled to any relief.

THIS was an action by the Plaintiff, who had been expelled from a trades union of which he was a member, against the committee and trustees of the union, claiming to be entitled to share in the benefits of the union, and that the Defendants might be restrained from excluding him therefrom.

The statement of claim alleged that the "*Journeymen Hatters' Fair Trade Union of Great Britain and Ireland*" was a trade union of journeymen hatters duly registered under the *Trades Union Act*, 1871 (34 & 35 Vict. c. 31), and that the Defendants were the trustees and committee of the union; that the said "*Fair Trade Union*" held its meetings at *Denton*, near *Manchester*, and was governed by rules; and that rule 73 was as follows:—

"Any journeyman binding his son in a foul shop shall be fined £5, and not be entitled to any benefit until he has paid his fine and contributed twenty-six weeks according to rule."

A "foul shop" was, as was stated, a shop in which non-unionists were employed.

The statement of claim further alleged as follows:—

That a son of the Plaintiff had been apprenticed by him to Messrs. *Mason*, of *Denton*, whose work was done by members of a trade union called "*The Hatters' Mutual Association*"; but that, on the failure of this firm, the indentures were cancelled, and he shortly afterwards obtained employment with Messrs. *Turner & Co.*, whose work was also done by members of the said "*Hatters Mutual Association*":

That on the 3rd of May, 1878, the secretary of the "*Journeymen Hatters' Fair Trade Union*" wrote to the Plaintiff that if he did not remove his son from Messrs. *Turner & Co.'s*, further proceedings would be taken against him by the committee at once; that the Plaintiff declined to remove his son, whereupon the committee fined the Plaintiff £5 under rule 73; that such fine was improperly

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imposed, as Messrs. *Turner & Co.'s* was not a "foul shop" within the meaning of rule 73, and that the Plaintiff's son was not bound or apprenticed there:

That the Plaintiff having refused either to pay the fine or to remove his son the Defendants had purported to expel the Plaintiff from the union, and sent a note to his employers stating that the members of the union would refuse to work any longer with the Plaintiff, whereupon the Plaintiff was discharged by his employers and had been unable to obtain employment elsewhere:

That the Plaintiff had tendered to the Defendants the contributions which as a member he ought to pay, but the Defendants had refused to receive the same, alleging that the Plaintiff was no longer a member of the union:

That the Plaintiff had in all other respects conformed to the rules, and that his expulsion was capricious and wrongful, and had caused and would cause serious injury to the Plaintiff, and that the Defendants threatened and intended in the future, unless restrained, to exclude the Plaintiff from the said "*Fair Trade Union.*"

The Plaintiff claimed a declaration that as long as he should conform to the rules of the said "*Fair Trade Union,*" which he thereby offered to do, he was entitled to participate in the enjoyment of the property and effects of the trade union, and in its rights, privileges, and benefits, and that the pretended expulsion of the Plaintiff from the said trade union was invalid, and that the Defendants might be restrained by injunction from excluding the Plaintiff from such participation. There was also a claim for damages by reason of the Plaintiff's alleged improper expulsion. The statement of claim did not allege that the said "*Fair Trade Union*" possessed any property.

The Defendants, by their statement of defence, said that the fine was properly imposed on the Plaintiff, and that, if he was dissatisfied with the decision respecting the same, or with the action taken by the "*Fair Trade Union*" or their committee in the matter, he should have appealed to a general meeting, and that he had no right to relief in this Court.

They further said that Messrs. *Turner & Co.'s* works were a "foul shop" within the meaning of the rules, and that the Plain-

tiff could not as a member of the union place his son at their works without the assent of the union or the committee thereof, which consent had not been obtained.

They submitted that the Court had no jurisdiction with respect to any of the matters in difference between the Plaintiff and the "*Fair Trade Union*," or the members or committee thereof; and that in any case they had acted *bonâ fide* as officers of the union.

The rules which governed the "*Fair Trade Union*" were not, except as before stated, set out in the statement of claim. These rules provided that all the members should pay certain subscriptions, and should also be liable to certain fines, and that the moneys so raised should be applied for the purposes mentioned in the rules, and for no other purpose. These purposes were partly for the benefit of the members of the union, including provision in case of sickness and of want of employment, payments to members on strike, payments in aid of the emigration of members, and in the event of death, payments in aid of the funeral expenses, and provisions for the widows and children of deceased members. The rules provided that any member admitted under a fine should not be admitted to any benefit until he should have paid the whole fine and twenty-six weeks' contributions.

There were other rules respecting the trade of journeymen hatters providing (among other things) what number of apprentices were to be employed, and generally purporting to regulate the trade, including rule 73 before mentioned.

Ince, Q.C., and *T. J. Edwards*, for the Plaintiff:—

The Plaintiff, as a member of a trade union, is entitled under the *Trades Union Act*, 1871 (1), to maintain his action. The

(1) The material sections of the *Trades Union Act*, 1871, are as follows:—

Sect. 2. "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

Sect. 3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

Sect. 4. Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:—

1. Any agreement between members

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jurisdiction of the Court with regard to trades unions under that Act is recognised by Mr. Justice *Blackburn* in the case of *Reg.* v. *Registrar of Friendly Societies* (1). The legality of such unions, though in restraint of trade, is established by sect. 3 of the Act, and, though sect. 4 contains restrictions upon the power of the Court to entertain any legal proceedings with respect to certain agreements between members of such unions, yet there is nothing which would prevent the Court from granting the Plaintiff the relief which he claims.

It may be said that there is no interference with any right of property in the Plaintiff alleged in the statement of claim. But under the rules the Plaintiff as a subscriber was entitled to certain benefits, and if necessary the statement of claim could be amended. We contend that his expulsion was a wrongful act, and that the Plaintiff is entitled to the declaration and the injunction which he claims.

Chitty, Q.C., and *C. Crompton*, for the Defendants, were not called on.

JESSEL, M.R. :—

I am called upon to give an opinion as to the construction of this Act of Parliament.

It does not appear to me that the case referred to of *Reg.*

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of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed.

2. Any agreement for the payment by any person of any subscription or penalty to a trade union.
3. Any agreement for the application of the funds of a trade union—
   (*a*) To provide benefits to members; or
   (*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or regulations of such trade union; or
   (*c*) To discharge any fine imposed upon any person by sentence of a court of justice; or
4. Any agreement made between one trade union and another; or
5. Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

(1) Law Rep. 7 Q. B. 746.

v. *Registrar of Friendly Societies* (1) has any bearing whatever upon the point I have to decide. Sect. 4 was not then before the Court, and no opinion was expressed as to its meaning. The matter therefore appears to me to be free from authority.

The first question that I will consider is, what is the jurisdiction of a Court of Equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any Court of Justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place where there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any Court of Justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the Courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy—in such cases no Court of Justice can interfere so long as there is no property the right to which is taken away from the person complaining.

If that is the foundation of the jurisdiction, the Plaintiff, if he can succeed at all, must succeed on the ground that some right of property to which he is entitled has been taken away from him.

(1) Law Rep. 7 Q. B. 741.

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That this is the foundation of the interference of the Courts as regards clubs I think is quite clear. If we look at the Lord Chancellor's judgment in the case of *In re St. James's Club* (1), he says this: "What, then, were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and, if the club was broken up while he was a member, he might file a bill to have its assets administered in this Court, and he would be entitled to share in the furniture and effects of the club." So that he puts it that the member has an interest in the assets.

In the case of *Hopkinson* v. *Marquis of Exeter* (2) Lord *Romilly* says this: "This is an application by the Plaintiff asking a declaration that he is entitled to the enjoyment of the property and effects of the *Conservative Club*, and to participate in its rights, privileges, and benefits, and also that the Defendants, the committee of the club, may be restrained by injunction from excluding him therefrom." So that he starts with the enjoyment of property, and the subsequent cases have gone on the same ground.

The present Plaintiff certainly does not state in his statement of claim that there is any property at all here, and I think that that is a fatal objection to the statement of claim altogether, and I might, if I thought fit, dismiss the action simply on that ground. He states nothing but that there is an association which he calls a "Trades Union,"—the "*Journeymen Hatters' Fair Trade Union*"—as governed by rules. He says that he has been a member, and that he has been unfairly and improperly expelled, but he does not allege that there is any property of any kind or description belonging to the union, or that he is entitled to any share of it. That is, however, a very technical ground, and I intend to base my judgment also on the larger ground that if he had stated fully the position and rules of this trades' union to which he belonged, the result would have been the same, for the reasons I am about to state.

If he had stated the rules this would have been discovered from them, that the members pay subscriptions and are liable also to the payment of certain fines, and that the moneys subscribed in

(1) 2 D. M. & G. 383, 387. (2) Law Rep. 5 Eq. 63, 66.

that way are applicable to various purposes, which may be divided into two, those which I will call benefit purposes, and those which I will call trade purposes. The benefit purposes are the usual provisions of benefit societies amongst workmen,—provisions for sickness, for want of employment, for the deaths of the members and of their families, for providing funerals, for making provision for their widows and children, and so forth. Those are personal benefits to the members of the societies, and, no doubt, the law of benefit societies confers on the members of the benefit society, in consideration of their having paid their subscriptions, rights of property, that is, the right to participate in the benefits according to the rules of the society.

The other purposes, which I will call trade purposes, are of a totally different character. Their object is to regulate the carrying on of the trade of journeymen hatters, to provide in substance that the number of apprentices to the trade shall be limited, that the number of persons employed shall be limited, that they shall only work in shops in which no other persons work than persons who are recognised by the "*Journeymen Hatters' Fair Trade Union*," and generally to control the affairs of the trade. There are some other special and peculiar provisions and privileges as well, which it is very dfficult to put under the trade rules, but they really are portions of the trade rules, and all regulate the trade and the conduct of the people in the trade. Those are the trade purposes. As regards them there is no actual property at all; the members raise money, but it is to be applied for the one purpose of regulating the trade.

It is under the first portion of the rules that the Plaintiff has a direct interest, that is, he has a right to participate in benefits by virtue of having paid his subscriptions. [His Lordship then stated the terms of the Plaintiff's claim.]

That being the position of the Plaintiff, we must consider what the *Trades Union Act*, 1871, provides. That Act, no doubt, was passed primarily with a view to preventing the treasurers and secretaries and officers of these societies from robbing them; that was the chief object. It was discovered that some of these men, abusing the confidence reposed in them, took advantage of the law which made these societies illegal, by appropriating their

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funds and property to their own use. That, no doubt, was one of the principal objects, and therefore the Act was passed to get at these men. Another object was this: there was a great difficulty in suing and getting their property from third persons, and one object of the Act was to enable these societies to sue in respect of their property, and also to enable them to hold property, such as a house or office, but it was not intended that the contracts entered into by the members of the society should be made legal contracts *inter se*, so that Courts of Justice should interfere to enforce them. If that had been intended the result would have been this, that an agreement between a number of workmen once entered into, compelling them to work in a particular manner, or to abstain from working in a particular manner, would have been enforceable according to law, and to a certain extent would have reduced some portion of the workmen to a condition of something like serfdom and slavery. Of course the Legislature, by interfering, had no idea of doing anything of that sort. Again, the Act recognises the principle that men may enter into any contract they think fit: there is an exception in the case of a contract for borrowing in this country, and I hope that exception will always remain in whatever form that contract may be expressed.

Then the Act goes on to provide, in sect. 2, that the purposes of a trades union shall not, by reason that they are in restraint of trade, be deemed to be unlawful so as to render the members criminally liable; and then, by sect. 3, for the same reason, that the purposes shall not be unlawful so as to render void or voidable any agreement or trust. That applies to the rules of this union, and does not render them unlawful for being in restraint of trade, and then there comes this provision in sect. 4: "Nothing in this Act shall enable the Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements." Then it specifies what they are, and one of them is, "any agreement for the application of the funds of a trades union to provide benefits for members."

I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in

favour of the Plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less.

The only question remaining, therefore, is whether the negative words in this Act, "nothing in this Act shall enable," really prevent me giving him any relief whatever, because those words do not say that the Court may not otherwise enforce; all the section says is, "Nothing in this Act shall enable."

The question, therefore, which I have to consider is, what would have happened without the Act? And it appears to me that without the Act it is clearly an unlawful association; it is an association by which men are not only restrained in trade, but they are bound to do certain acts under a penalty. Take the very act for which this man was expelled. He was expelled because he bound his son apprentice in a shop where the workmen did not belong to this union but to another union. That is the allegation. And the rule is that any man binding his son in a "foul shop," which, as it has been explained to me, includes a shop of this description, where the members employed belong to another union and not to this union, shall be fined £5, and so on according to the rules. I see a great number of other stipulations of a character which are not only a restraint in trade, but so much in restraint of trade, limiting the subject of it, that I have no doubt that before this Act was passed these rules would have been altogether illegal; and if nothing in the Act, therefore, will assist the Plaintiff, he must still be in the position of a member of an illegal association coming to a Court of Justice to assist him to enforce his rights under that illegal association.

If that is so, it is impossible for me, and I do not think it ever was intended by the Legislature, looking to the terms of the Act of Parliament, to enable the Courts to interfere on behalf of the members of these societies for the purpose of getting relief *inter se* with respect to rights and liabilities contrary to the Act; and in construing the Act as I do, I believe I am not only

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fairly construing it, as is my habit, according to the literal meaning itself, but according to the manifest intention of the Legislature. The action will therefore be dismissed with costs.

Solicitors for Plaintiff: *Spencer & Gibson*, agents for *Toy & Broadbent, Ashton-under-Lyne.*

Solicitor for Defendants: *C. W. T. Yielding*, agent for *Cobbett, Wheeler, & Cobbett, Manchester.*

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[1880 G. 1.]

Practice—"Action for the Recovery of Land"—Action to establish Title—"Possession"—Joinder of Causes of Action—Leave of Court—Rules of Court, 1875, *Order* XII., *rr.* 18, 19, 20, 21; XIII., *r.* 7; XVII., *r.* 2; XIX., *r.* 15; XXIX., *r.* 7; *Appendix* (*A*), *Part II.*, § *iv.*; *Appendix* (*C*).

21 Ch D 44

An action "to establish title to land," not claiming possession, is not an action "for the recovery of land," so as to require the leave of the Court, under Rules of Court, 1875, Order XVII., rule 2, for its joinder with another cause of action.

Whetstone v. *Dewis* (1) not followed.

Where the writ was indorsed for declaration of title, declaration that a lease was granted under a mistake, recovery of rents and profits, and a receiver, and the statement of claim asked also for possession:—

Held, that this was an action for recovery of land and nothing else, and that there was no joinder of any cause of action which required the leave of the Court.

THIS was a motion by the Defendant in the above action that all further proceedings in the action might be stayed, and that the Plaintiffs might pay the costs of the action, on the ground that the action was one for the recovery of land, and that other causes of action had been joined therewith without the leave of the Court having been obtained for the purpose under Rules of Court, 1875, Order XVII., rule 2, before the issue of the writ.

The writ claimed to have it declared that the Plaintiffs, as trustees of the will of *Edward Ridsdale*, deceased, were entitled to the entirety of the rents and profits of a freehold messuage

(1) 1 Ch. D. 99.

and premises at *Barnsbury*, in the county of *York*, and that so far as the Defendant had any legal right to receive the said rents from the tenant in occupation of the said premises, she was a trustee thereof for the Plaintiffs: To have it declared that, so far as any lease or agreement for a lease of the said premises was concurred in by the Defendant with the sanction of the said *Edward Ridsdale*, deceased, such concurrence was had or allowed under a mistake of title common to the Defendant and to the said *Edward Ridsdale:* A receiver of the rents and profits of the said premises: An injunction to restrain the Defendant from receiving the rents and profits of the said premises: An account of the rents and profits of the said premises received by the Defendant since the decease of the said *Edward Ridsdale:* Payment of the rents and profits so received: Costs; and further or other relief.

From the allegations in the statement of claim it appeared that on the death of *Harriet Ridsdale*, the mother of the said *Edward Ridsdale*, the property was, by a mistake of title, treated as belonging to *Edward Ridsdale* and his sister, the Defendant, *Bessy Hunter*, as tenants in common, instead of as belonging to *Edward Ridsdale* alone as heir-at-law of his mother. It was also alleged that upon the death of their mother *Edward Ridsdale* and *Bessy Hunter* both entered into receipt of the rents and continued to receive the same until the death of *Edward Ridsdale*, since which time the whole of the rents had been received by *Bessy Hunter*. It was also alleged that under the above mistake of title a lease of the property had been granted by *Edward Ridsdale* and *Bessy Hunter* to certain tenants who were now in possession.

The Plaintiffs were devisees in trust for sale under the will of *Edward Ridsdale*. By their statement of claim they claimed the same relief as by their writ, with the addition of "possession of the said freehold property."

Seward Brice, for the motion:—

An action for a declaration of title to land is "an action for the recovery of land," within the meaning of Rules of Court, 1875, Order XVII., rule 2, and, therefore, looking first of all at the indorsement of the writ, the Plaintiffs should have obtained the leave of the Court before joining the latter part of their claim to the first,

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which is for a declaration of title: *Whetstone* v. *Dewis* (1). The claim to set aside the lease is, I submit, a distinct cause of action, which cannot be joined without leave: the only cause of action that could be joined under the rule would be the claim for rents and profits, that being in substance a claim "in respect of mesne profits or arrears of rent." Accordingly, the Plaintiffs not having obtained leave under this rule to issue their writ in its present form, all the proceedings must be stayed: *In re Pilcher, Pilcher* v. *Hinds* (2).

But, secondly, even if the writ itself does not fall within Order XVII., rule 2, the statement of claim clearly does, since it asks, in addition to the relief claimed by the writ, "possession" of the land, which alone is a sufficient ground for the motion.

Chitty, Q.C., and *Caldecott*, for the Plaintiffs, were not called upon.

JESSEL, M.R.:—

The first question I have to decide is whether an action commenced by a writ indorsed as this is—putting aside for the moment the statement of claim—is "an action for the recovery of land," within the meaning of Order XVII., rule 2. Upon that I am referred to a decision of Vice-Chancellor *Hall* in *Whetstone* v. *Dewis*, in which he is supposed to have decided that an action to establish title to land is an action for the recovery of land within the rule. I say "supposed to have decided," because I do not think he finally decided the question. His judgment is this: "I think that an action to establish title to land is an action for the recovery of land so as to require the leave of the Court under the Rules of Court, 1875, Order XVII., rule 2, for its joinder with another cause of action:" and he gave the leave.

I agree, the Vice-Chancellor says "I think": but the matter only came before him upon an application for leave, and the leave could do no harm; it might have been granted *ex abundanti cautelâ;* and a Judge saying "I think," on the 24th of November, 1875—three weeks after the new Rules came into operation—cannot be said to have given a final judgment where there was no

(1) 1 Ch. D. 99. (2) 11 Ch. D. 905.

argument, but a mere application for leave. I think, therefore, I ought not to treat this as a deliberate decision by the Vice-Chancellor *Hall* that such an action is an action for the recovery of land within the Rules. Although I wish to treat the decision with every possible respect, I look upon the case as one where an *ex parte* application for leave is made to a Judge and he says, "I think so and so, and I will give you leave." That cannot preclude him—much less can it preclude other Judges—from afterwards deliberately considering the question and deciding it after argument. In fact, I decline to treat this as a binding authority upon me. Even if it were a deliberate judgment, it would not be actually binding upon me, but I should be very loth to differ from it, although the matter might ultimately go to the Appeal Court to be finally settled.

In my opinion, an action for the establishment of title only, not claiming possession, is not an action for the recovery of land under the Rules. Where the property is let to tenants, and the person who brings the action only seeks to establish his title to receive the rents as against the Defendant, it does not appear to me that such an action is within the words or the true meaning of the Rules.

Now what was the old practice as to such a claim? Before the Judicature Acts, in such an action—that is, in a suit in Chancery—the legal estate being outstanding, you could have made any claim, that is, asked for any relief you liked. There was, practically, no limit. You might have joined any cause of action with such a claim, so long as you did not make your bill open to objection on the ground of multifariousness: that was the only limit.

An action at law to recover rents from the man who had improperly received them, was not, in form, an action of ejectment, but an action for money received for your use. You might have to establish your title in such an action, or in such a suit, because your right to the rents might depend upon your title; but still such an action depended upon totally different grounds from that upon which an action for the possession of land was based.

Now, in ejectment there was a rule that you could join no other cause of action; and there were reasons for that rule on account of certain peculiarities attending the action of ejectment. The

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action of ejectment was a possessory action: it was to recover possession from the tenant: and inasmuch as if you sued a man in possession who might be a poor man, or a man who was tenant from year to year at a rack rent which he could not pay, he might let judgment go by default, the result was that the Legislature had to pass an Act of Parliament making it necessary for the tenant sued to give notice to his landlord under certain penalties. The Courts of Common Law also introduced this practice, that, although you sued the tenant, the landlord might come in and defend. Those were things which did not apply to any other action—it was a very peculiar action.

On studying the new Rules it will be found that all these peculiarities are carefully preserved. They were necessary for the purpose of doing justice. There was another peculiarity about ejectment: the Defendant pleaded nothing but "not guilty." He did not put in any special pleas at all, but let the Plaintiff prove his title. That was found to be necessary, because it was thought to be unjust that anybody asserting a claim to land should be in a position to call upon the landowner in possession to prove his title. That was another peculiarity about the action of ejectment, and again we shall find that all that is preserved in the new action for the recovery of land which takes the place of ejectment.

Now, I think it is desirable to go through the several provisions in the Rules dealing with this question, because we have a decision upon it by the Vice-Chancellor *Hall*, a Judge whose opinion, I need not say, is entitled to every respect from me. The case is reported, and may, no doubt, be treated by the profession as a binding authority on the subject.

First of all let us see what happens under the Rules if there is no appearance in an action for the recovery of land. Order XIII., rule 7, says, "In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply."

How could that rule have any application to an action for the

mere recovery of rents? The judgment in default of appearance in such an action would be that the plaintiff do recover the rents claimed, a judgment, therefore, in a different form from that in an action for the recovery of land: this shews that an action for a declaration of right to the recovery of rents is not an action for the recovery of land.

The next rule that applies is rule 15 of Order XIX.: "No defendant in an action for the recovery of land who is in possession by himself or his tenant"—it is only limited to that—"need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned."

That clearly does not apply to the right to the recovery of rents, but only where the claim is for the actual recovery of possession.

The next rule I will refer to is rule 7 of Order XXIX.: "In an action for the recovery of land, if the defendant makes default as mentioned in rule 2"—that is, if he does not deliver a defence or demurrer in due time—"the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs"—a very useful judgment indeed. If a man wanting to recover possession brought an action to recover the rents only, he would not recover what he actually wanted.

Then the 8th rule is this: "Where the plaintiff has indorsed a claim for mesne profits, arrears of rents, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in rule 2, or if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in rules 4 and 5." That is, he will go on to get his possession of his land, and then he will get his arrears of rent or mesne profits.

Now I will turn from these rules to the rule allowing the land-

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lord to come in and defend, which follows again the old system in ejectment. That is rule 18 of Order XII.: "Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or Judge appear and defend, on filing an affidavit shewing that he is in possession of the land either by himself or his tenant." How would that apply to an action for the recovery of rents or for a declaration of title?

Then the 19th rule is this: "Any person appearing to defend an action for the recovery of land as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord."

Then the 20th rule is, "Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or Judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants."

Then the 21st rule is, "Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ," describing that part in his memorandum of appearance or in a notice. Then the next rule gives a form of notice.

Now all these rules are based upon the practice in the old action of ejectment, and only apply to a recovery of possession, shewing what the meaning of an action for the recovery of land is. If we turn to Appendix (A) to the Rules we shall see how clear that is. Part II. of the Appendix gives forms of indorsements of writs; and in sect. 4 of Part II. we have the marginal note "Ejectment," with this form: "The plaintiff's claim is to recover possession of a house, No. . , in *Street*, or of a farm called *Blackacre*." The marginal note to the next form is this, "To establish title and recover rents." It is no longer ejectment: it is a different kind of action. The form is, "The plaintiff's claim is to establish his title to [here describe property], and to recover the rents thereof." Then there is a note: "The two previous forms may be combined." And it is provided that they may be combined because there is a rule to which I have referred—the 2nd rule of Order XVII.—which says that "no cause

of action shall unless by leave of the Court or a Judge be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent."

A claim to establish a title, a claim for possession, and a claim for arrears of rent, are exactly what you would combine. To establish a title is only preliminary to recovery of possession, and therefore you may combine those causes of action without any leave at all. The marginal notes I have referred to shew two things; first of all, that an action of ejectment is distinguished from an action to establish title and to recover rents; and secondly, that both actions are not for the recovery of land, although it is said they may be combined.

Turning from these forms we will proceed to the next set of forms—forms given for pleadings. The forms under No. 24 in Appendix (C) are forms of pleading given for an action for the recovery of land; the claim being as follows: "The plaintiff claims—1. Possession of the house. 2. *l.* for mesne profits from the day of ." That is what he claims in the statement of claim. There is another form (No. 25) where the claim is as follows:—"The plaintiff claims—1. Possession of the house and two farms; 2. *l.* for mesne profits of the premises from the death of *L.* till such possession shall be given." Both forms, therefore, are forms, not for the establishment of title and for arrears of rent, but for the recovery of possession; thereby shewing—as all the rules shew, and the whole nature of the case shews when it is carefully looked at—that an action for the establishment of title and recovery of rents, not asking possession, is not an action for the recovery of land within the meaning of this Act of Parliament. Of course, if you do in fact ask for possession, it becomes immediately an action for the recovery of land; and therefore I go to the second question in this case, which is whether the Plaintiff can escape from the statement of claim when he does ask for possession: and I think he cannot say on this motion that he has not asked for it, because, having actually stated, no doubt by a slip, that the land is in possession of tenants, so that he cannot have it, he has put in a claim "for possession of the said freehold property." Looking, then, at the form of this statement of claim, I have to consider whether this action is open to the

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objection of being treated as an action for the recovery of land; for I cannot say that because a statement of claim is demurrable by a terre tenant (if there was one a defendant) that prevents the action being treated as one for the recovery of land. The objection to it is this: it is said that this is an action to establish title; to declare that a lease was entered into by mistake; for a receiver, and an injunction to restrain the Defendant from receiving the rents.

Now, what does "an action for the recovery of land" mean? It means the recovery of possession, and you combine with a claim for that a claim for the rents. Then does the fact of the machinery, so to speak, being stated in the statement of claim make any difference? Does it make any difference as regards the cause of action—for that is what we must look at? It is not a new cause of action: it is the same cause of action. The Plaintiff says, "I am entitled to a freehold estate: I ask for my title to be declared, and I ask for possession to be given to me." The claim for a declaration of title and the claim for possession are not the cause of the action: they are only a statement at full length of what the cause of action really is, namely, to recover the land. Therefore, the mere fact of a claim for a declaration of title preceding the demand or claim for the recovery of possession does not make it less an action for the recovery of land: there is no new cause of action joined.

But then it is said that the Plaintiffs ask in addition that the lease may be declared to have been entered into under a mistake. Again I must see whether that is a new cause of action. When you come to look at the pleadings the case is this: The Plaintiffs' predecessor concurred in a lease with the Defendant under a mistake as to his title, and the Plaintiffs now say they are not bound by that—that is, they are anticipating a defence, namely, that their predecessor confirmed the title of the Defendant, and they say he did not.

Well, this part of the claim is, again, mere machinery; it is part of the judgment which the Plaintiffs want to enable them to recover the land; it is not a new cause of action, for the whole cause of action is their title. Their title is first made out positively up to a certain point, and then by the removing out of their

way that which otherwise might be a confirmation of their adversary's title. The whole claim is founded on declaration of title, which I say is not a separate cause of action.

That gets rid of the objections to the joinder of this claim. The next thing the Plaintiffs ask is for a receiver of the rents and profits. Well, that is only another form of getting possession. It cannot be less an action for possession because you ask for a receiver also. It cannot be said that that is a new cause of action; it is a mode of securing possession of the land until the title is finally determined.

Then they ask for an account of the rents. I take it an account of the rents is either of mesne profits or arrears of rents; it is one or the other. In this case it is probably mesne profits, because an account is asked against the person who claimed to be the landlord and got the rents from the tenants. The Plaintiffs are at least entitled to what the Defendant actually got from the land; that is, mesne profits. It appears to me that this is only another form of asking for mesne profits, namely, the sums which the Defendant actually received from the tenants to whom he let the land.

I am of opinion that this is an action for the possession of land; that there is no objection to it; that it is entirely within Order XVII., rule 2, and that the motion must be refused with costs.

Solicitors for Plaintiffs: *Shum & Co.*, agents for *Fenton, Owen, & Hall, Huddersfield.*

Solicitors for Defendant: *Torr & Co.*

M. R.

1880

April 6.

In re ARTISTIC COLOUR PRINTING COMPANY.

Limited Company—Presentation of Winding-up Petition—Action in Common Law Division—Staying Proceedings—Execution by Sheriff—Companies Act, 1862, *ss.* 85, 87; *Judicature Act*, 1873, *s.* 24, *sub-s.* 5; *Judicature Act*, 1875, *s.* 11, *sub-s.* 1.

Where an action has been brought against a limited company in a Common Law Division, any application under sect. 85 of the *Companies Act*, 1862, to stay proceedings in the action during the pendency of a winding-up petition in the Chancery Division—as for instance, an application to restrain proceeding with an execution against the company under the judgment—should, having regard to sect. 24, sub-sect. 5, of the *Judicature Act*, 1873, and sect. 11, sub-sect. 1, of the *Judicature Act*, 1875, be made in the Common Law Division to which the action is attached, and not in the Chancery Division.

In re Perkins Beach Lead Mining Company (1) disapproved of.

IN an action brought in the Exchequer Division against the *Artistic Colour Printing Company* the Plaintiff had recovered judgment for £3533 17*s.*, and under a writ of *fi. fa.* issued under the judgment the company's effects had been seized by the sheriff.

Prior to judgment being signed the company had passed a resolution for a voluntary winding-up.

After judgment signed and possession by the sheriff, a creditor of the company presented a petition to have the voluntary winding-up continued under supervision; and this petition was still pending.

The sheriff being about to proceed to a sale, an *ex parte* application was now made on behalf of the petitioning creditor to restrain the judgment creditor and the sheriff from proceeding further with the execution, the applicant alleging that a forced sale would seriously diminish the company's assets.

Burton Buckley, for the applicant:—

This application is made under sect. 85 of the *Companies Act*, 1862, which says that the Court may at any time after the presentation of a winding-up petition, and before making a

(1) 7 Ch. D. 371.

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In re ARTISTIC COLOUR PRINTING COMPANY.

winding-up order, restrain "further proceedings in any action, suit, or proceeding against the company." That a sale by the sheriff is a "proceeding" within that section, and may therefore be restrained by the Court, *In re Perkins Beach Lead Mining Company* (1) is a direct authority.

[JESSEL, M.R.:—In that case it seems to have been overlooked that under sect. 24, sub-sect. 5, of the *Judicature Act*, 1873, and sect. 11, sub-sect. 1, of the *Judicature Act*, 1875, an application to stay proceedings in any cause or matter should be made in the Division to which the cause or matter is attached. Why do you not apply in the Exchequer Division?]

I understand that in a purely voluntary liquidation the Judges of the Common Law Divisions refuse to entertain any application to stay proceedings in an action against the company in any of those Divisions; but that where a petition is pending they will entertain such an application.

[JESSEL, M.R.:—If that is so, voluntary liquidation will soon go out of fashion.]

Even where a petition is actually pending, there seems to have been some doubt whether the Judges of the Common Law Divisions will interfere (2).

In the present case I submit that your Lordship has jurisdiction. A sale by the sheriff is not, strictly speaking, a proceeding in the action, it is a new proceeding altogether.

[JESSEL, M.R.:—The sheriff is an officer of the Court, and any proceeding by him in an action in that Court is a proceeding in that Court.]

I am seeking to restrain the sheriff from a personal act: execution is a proceeding against the company outside the action, the action itself being completed by the judgment.

[*Chitty*, Q.C., *amicus curiæ*:—Your Lordship had a similar

(1) 7 Ch. D. 371.

(2) See *Kingchurch* v. *The People's Garden Company, Limited* (1 C. P. D. 45), and *In re People's Garden Company* (1 Ch. D. 44); also *Walker* v. *The Banagher Distillery Company, Limited* (1 Q. B. D. 129).

M. R. 1880 *In re* Artistic Colour Printing Company.

application before you in 1877, in *In re Hooper's Telegraph Company, Limited*, and you refused to grant an injunction.]

[*In re London and Devon Biscuit Company* (1) and *In re South of France Pottery Works Syndicate* (2) were also referred to.]

Jessel, M.R.:—

The case of the *Perkins Beach Lead Mining Company* (3) is no authority on this point, because it appears from the report that the *Judicature Act*, which has an important bearing upon the point, was not referred to in any way either by the Judge or the counsel.

I know I have decided the point over and over again, and in fact Mr. *Chitty* has reminded me of the case of *Hooper's Telegraph Company*, in 1877, in which I decided it.

I must say I entertain no doubt whatever upon this case. It seems that a judgment had been obtained in an action against the company in the Exchequer Division. A writ of *fi. fa.* was issued under the judgment: execution was levied, and the sheriff is about to sell.

The company being in difficulties passed a resolution for a voluntary winding-up. Then a creditor presents a petition for a supervision order, and he now applies to this Division of the High Court to restrain the sheriff from selling, that is, to restrain execution under the judgment.

The question then arises, ought the application to be made here?

Under the 85th section of the *Companies Act*, 1862, the Court "may," at any time after the presentation of a winding-up petition, and before making a winding-up order, upon the application of any creditor of the company, "restrain further proceedings in any action, suit, or proceeding against the company:" it is not very happily put—"proceedings in any proceeding"—but what the section means is, "proceedings in any matter."

Then the 87th section says that, after a winding-up order has been made, "no suit, action, or other proceeding shall be pro-

(1) Law Rep. 12 Eq. 190. (2) 37 L. T. (N.S.) 260.
(3) 7 Ch. D. 371.

ceeded with or commenced against the company except with the leave of the Court."

The word "proceeding" in both sections of course includes execution under a judgment in an action. Now when we come to the 24th section of the *Judicature Act*, 1873, we find that the 5th sub-section says this: "No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction." What does that mean? The Court never did by injunction restrain a proceeding: what it did was to restrain a party to a cause from going on. Therefore, when the Act says, "no cause or proceeding shall be restrained by injunction," it means that no party shall be restrained from going on with his action. This is what the Act means; otherwise it would seem to imply that one branch of the High Court had power to restrain another branch. Then the sub-section says: "Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not passed, to apply to any Court to restrain the prosecution thereof, ... shall be at liberty to apply to the said Courts respectively by motion in a summary way, for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purposes of justice."

Therefore, to stay proceedings in any cause or matter you apply to the High Court of Justice, and then we find that under the 11th section, sub-sect. 1, of the Act of 1875, any such application must be made "in the Division of the said High Court to which such cause or matter is for the time being attached:" thus, if the cause or matter is attached to the Exchequer Division, as it is here, the application must be made in that Division and no other.

I therefore refuse this application.

Solicitors: *Wilkinson & Howlett.*

M. R.

1880

May 1.

WARD *v.* WARD.

[1879 W. 98.]

Husband and Wife—Marriage Settlement—Annuity payable to Husband and Wife "during their joint lives"—Tenancy by Entireties—Liability to Husband's Debts—Wife's Equity to a Settlement.

By an ante-nuptial settlement the wife's father covenanted with the trustees to pay to them during his life an annuity of £60, to be held by them upon trust to pay the same "unto and to the use of the husband and wife during their joint lives," and after the death of the husband to the use of the wife absolutely, with trusts for the husband if he survived her, and for the children:—

Held, that, as the husband and wife took the annuity as tenants by entireties, the whole of it during their joint lives was liable to the husband's debts, and that the wife had no equity to a settlement out of it.

By a settlement dated the 5th of August, 1868, made prior to the marriage of the Defendant, *Henry Seekamp Ward*, and *Helen Wise*, *Thomas Wise*, the lady's father, covenanted with trustees to pay to them during his life an annuity of £60; and it was declared that the trustees should stand possessed of the said annuity "upon trust to pay and apply the said sum of £60 when and as the same shall be received unto and to the use of the said *Henry Seekamp Ward* and *Helen Wise* during their joint lives;" and after the death of the husband to the use of the wife absolutely; and after the death of the wife leaving issue during the life of the husband to the use of the husband for his life; and after the death of the survivor of the husband and wife, upon trust for the children of the marriage.

By an order of the 4th of April, 1879, made in the above action, the Defendant, *Henry Seekamp Ward*, was ordered to pay to the Plaintiffs a sum of £52 10*s*., and a further sum of £25 for the agreed costs of this action and certain County Court actions.

The Defendant having failed to comply with that order, the Plaintiffs, on the 18th of December, 1879, obtained a garnishee order *nisi* directing that the annuity payable "to the defendant, *H. S. Ward*," under the settlement, should be attached to answer the sums payable under the previous order, and that the trustees

of the settlement should attend to shew cause why they should not pay to the Plaintiffs the annuity due from them, the trustees, "to the said *H. S. Ward*," or so much thereof as should be sufficient to satisfy the said two sums.

The Plaintiffs now applied that the order *nisi* might be made absolute.

Chitty, Q.C., and *Stock*, for the Plaintiffs.

Ince, Q.C., and *Nalder*, for the trustees:—

The husband and wife take this annuity as tenants by entireties, and we do not deny that the husband alone has the legal right to receive it; but we contend that if he, or any person claiming under him, comes to this Court and asks for payment of the whole to him, the wife is entitled to her equity to a settlement: *Sturgis* v. *Champneys* (1); for the wife certainly takes some interest, which the Court may lay hold of.

In *Attorney-General* v. *Bacchus* (2) it was held that a bequest to a husband and wife was a gift to two persons, and the legacy duty was assessed accordingly. There Lord Chief Baron *Richards* said (3) that if the husband came into a Court of Equity to get the benefit of the legacy some provision for the wife would be ordered to be made out of it. The property here being small it seems a proper case for the settlement of the whole of it on the wife: *Taunton* v. *Morris* (4); *In re Kincaid* (5); at all events at least half should be settled upon her, the annuity having been intended quite as much, if not more, for the benefit of the wife than for the husband. *Atcheson* v. *Atcheson* (6), which may be cited against us, was the case of a simple gift of a legacy which vested a legal right in the legatee, whereas here the property is in trustees.

[*In re Wylde* (7) was also referred to.]

JESSEL, M.R.:—

I am sorry I cannot call upon the Plaintiff's counsel, because

(1) 5 My. & Cr. 97.
(2) 9 Price, 30; 11 Price, 547.
(3) 9 Price, 40.
(4) 11 Ch. D. 779.
(5) 1 Drew. 326.
(6) 11 Beav. 485.
(7) 2 D. M. & G. 724.

M. R. 1880 WARD v. WARD.

I think it is a very hard case on the lady; but I should, in my opinion, be making new law if I were to give effect to the present contention.

The husband and wife marry under a settlement by which the wife's father covenants to pay to the trustees of the settlement an annuity of £60, to be held by the trustees for the use of the husband and wife during their joint lives, and after the decease of either, then upon the trusts therein mentioned—for the wife absolutely if she survives, with certain provisions for the children and the husband if he survives.

Under that trust for the husband and wife there is no doubt that the husband is the only person entitled to receive the annuity; and the case has been argued on that footing. The interest which the husband and wife take is that curious kind of joint tenancy which is called a tenancy by entireties; that is, the husband and wife are treated as one person in law; and I am now asked to interfere with the legal right of the husband, for in this case it is still a legal right, although one enforceable only in a Court of Equity under a trust. I have no doubt whatever that the maxim that he who comes into equity must do equity would apply either to the husband or to his assignee seeking to recover the money, and the only question is—what is the equity of the case?

Now, although I have myself searched and have been assisted by the research of the Respondent's counsel, I have been unable to find a single instance where, in a case of a tenancy by entireties, any such equity as is now claimed has been established. The equity, as I understand it, is this: and it is as neatly stated as anywhere in Mr. *Macqueen's* book (1): "But wherever the husband is obliged to seek the aid of Equity, in order to get the benefit of his wife's property, the assistance of the Court is withheld until a provision for the wife is secured, if she requires it." It is stated there "the wife's property"; and in support of the proposition reference is made to *Sturgis* v. *Champneys* (2) and several other well-known decisions. As far as I am aware the authorities are limited to the wife's property only.

The question is whether the interest by entireties is the wife's

(1) *Macq.* Husband and Wife, 2nd Ed. p. 71. (2) 5 My. & Cr. 97.

property within the rule. There are upon this point two decisions: one is the case of *Edye* v. *Addison* (1), before Vice-Chancellor *Wood* in 1863, where real and personal property was given by will to a husband and wife as joint tenants; and the Vice-Chancellor says (2), speaking of this kind of gift: "It is real and personal property given by the will of the lady's brother to the husband and wife, as effectually to one as to the other, and in legal effect to the pair as one person. That cannot be called property taken in her right, and is certainly not within the language of the covenant in its literal meaning."

The covenant he referred to was a covenant to settle after-acquired property of the wife, and the property comprised being, first, what the husband and wife took in her right; secondly, what the husband took in her right; and thirdly, what the wife took, the Vice-Chancellor decided that the property given by the will did not come within any one of those classes of property, and consequently was not property of the wife.

But the exact point as to the right to the equity to a settlement came before Lord *Langdale* so long ago as 1849, in the case of *Atcheson* v. *Atcheson* (3), and I certainly should not feel myself at liberty to differ from that decision, considering its age and the fact that it was a decision which disregarded the *dictum* of the Chief Baron *Richards* in the case of *Attorney-General* v. *Bacchus* (4).

In *Atcheson* v. *Atcheson* a legacy was given "to *R. S. Atcheson*, his wife and children." It was held that the legacy was several; that the wife and the husband together took only one share, and that each of the children—there were three—took a share. Consequently the husband and wife took an interest as tenants by entireties in their share of the legacy. Then the wife, who was living apart from her husband, filed a bill to enforce her equity to a settlement out of that share; but the Master of the Rolls said that, notwithstanding the motive of the gift, which was service rendered by the husband, he should treat the case as one in which there was no indication of intention to give a separate interest to any of the objects. Then he says that he had held, under another gift in the same codicil, that the husband and wife were entitled to one

(1) 1 H. & M. 781.
(2) Ibid. 785.
(3) 11 Beav. 485.
(4) 9 Price, 30; 11 Price, 547.

M. R. 1880 WARD v. WARD.

share only, and he says that, as they are now living separately, the question is what separate interests they are entitled to. He then goes into the question rather elaborately, and shews that it is not an ordinary case of joint tenancy, but is a case of gift by entireties. Then he says (1), "I have been unable to derive any assistance from *Attorney-General* v. *Bacchus*" (2)—where the Lord Chief Baron had suggested in the course of the argument that a Court of Equity would make some provision for the wife out of a legacy given in terms to the husband and wife, on the ground that she took a direct and definite interest in it—and he says that no observation on the point was made either in the first judgment in the Court of Exchequer, or in the judgment of the Exchequer Chamber. Then he states that, in his opinion, payment to the husband alone in the lifetime of the wife would be a good payment, and that, if not paid to the husband, the wife would be entitled to the whole if she survived him; and then he winds up with these words: "Under all the circumstances, I think that all this Court can do for the protection of the wife, and to give her any separate benefit of the legacy, is, to preserve her right to it by survivorship, by preventing the husband from defeating it by alienation in her lifetime." That is, he preserves for the wife as her property, not the joint interest during the lives of the husband and wife, but her contingent interest as survivor. Then he ordered the legacy to be carried over to the joint account of the husband and wife, with a direction to the trustees to pay the dividends to the husband during their joint lives, with liberty for the survivor to apply.

Therefore that is a direct decision that in such a case the husband takes the whole income during the joint lives, and that the wife is not entitled to an equity to a settlement out of it. Of course that applies equally to a case where, as here, the property in question consists of an annuity given to the husband and wife during their joint lives, for the nature of the interest taken is identically the same.

The order will, therefore, be absolute, but only to pay during the life of the husband.

As to the costs, the trustees will take theirs first out of the

(1) 11 Beav. 490. (2) 9 Price, 30; 11 Price, 547.

fund: then the residue of the annuity during the life of the husband will be paid to the judgment creditor until further order; for the moment the debt of the judgment creditor has been satisfied the trustees will have to apply to stop further payments to him.

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Solicitors for Plaintiffs: *Dixon, Ward, & Co.*
Solicitors for Trustees: *Collyer-Bristow, Withers, & Russell.*

In re EVANS' SETTLEMENT.

M. R.
1880
June 12.

Practice—Railway Company—Sale by Tenant for Life—Payment of Purchase-Money to Trustees—Lands Clauses Consolidation Act, 1845, *ss.* 7, 69.

Where lands settled in trust for a widow during her life or until her second marriage, and, after her death or second marriage, in trust for sale, were purchased from the widow by a railway company under the 7th section of the *Lands Clauses Consolidation Act*, 1845, the purchase-money, which had been paid into Court by the company under the 69th section, was, on the petition of the widow, ordered to be paid out to the trustees of the settlement, they undertaking to hold the same upon the trusts of the settlement.

By a post-nuptial settlement, dated in 1871, certain freehold lands were conveyed by *James Evans*, the settlor, to trustees upon trust for his wife, *Eliza Evans*, during her life or until she should marry again; and after her death or second marriage, upon trust for sale, and to hold the proceeds upon trusts for the benefit of the children of the said *James Evans* by the said *Eliza Evans*.

James Evans died in 1874, leaving surviving him his widow, the said *Eliza Evans*, and several children by her, some of whom were infants.

A railway company having contracted with Mrs. *Evans* for the purchase of part of the lands under the 7th section of the *Lands Clauses Consolidation Act*, 1845, paid the purchase-money into Court under the 69th section, and thereupon the lands were duly conveyed by Mrs. *Evans* and her trustees to the company.

Mrs. *Evans* now presented a petition, asking, instead of the usual interim investment, that the fund might be paid out at once

M. R. 1880 *In re* EVANS' SETTLEMENT.

to the trustees, as if upon a sale under the trust for sale, they undertaking to hold the same upon the trusts of the settlement.

W. Frank Jones, for the Petitioner:—

An order similar to that now asked was made under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120): *In re Morgan's Settled Estates* (1).

C. S. Medd, for the railway company.

JESSEL, M.R., made the order as prayed.

Solicitors: *E. Warriner*, agent for *W. J. & H. G. Lloyd, Newport, Monmouthshire; R. R. Nelson.*

M. R. 1880 *June* 14.

BALL *v.* KEMP-WELCH.

[1880 B. 408.]

Practice—Partition Action—Costs.

As a general rule, the costs of a partition action should be borne by the parties in proportion to their interests as declared by the judgment.

Cannon v. *Johnson* (2) followed.

The costs of a partition action can be taxed as between solicitor and client only by the consent of the parties: otherwise they must be taxed as between party and party.

THIS was an action under the Partition Acts by the trustees of the will of one *Joseph Reynolds Ball*, who died in 1879, to effect a sale to the Defendant of the testator's one-sixth share of a freehold estate, of which the remaining five-sixths had already been purchased by the Defendant from the several owners thereof.

The action was rendered necessary in consequence of the trustees of the will having no trust or power of sale thereunder.

The action now came on upon motion for judgment on prepared minutes, the Defendant undertaking, under sect. 5, to purchase the one-sixth at a fixed price, being the same price as had been

(1) Law Rep. 9 Eq. 587. (2) Law Rep. 11 Eq. 90.

paid by him for each of the other sixths. The minutes commenced with a declaration of the shares and interests of the parties.

The only question was, what order should be made as to the costs of the action.

G. I. Foster Cooke, for the Plaintiffs, submitted that the costs should be borne by the parties rateably in proportion to their interests as declared by the judgment: *Cannon* v. *Johnson* (1).

Vernon R. Smith, for the Defendant, submitted that the old rule in partition suits should apply, namely, that each party should bear his own costs up to the hearing: *Landell* v. *Baker* (2).

JESSEL, M.R.:—

The general rule I always follow is that laid down in *Cannon* v. *Johnson*, namely, that the costs should be borne rateably; and I make the order accordingly in this case.

A question then arose whether the costs should be taxed as between solicitor and client or as between party and party, it being submitted, on behalf of the Defendant, that they should be taxed as between party and party only.

JESSEL, M.R.:—

The costs must be taxed as between party and party. Solicitor and client costs are only allowed by the consent of the parties.

Solicitors: *Gregory, Rowcliffes, & Rawle*, agents for *Isaac Cooke & Sons, Bristol; Lovell, Son, & Pitfield*, agents for *Pearce, Paris, & Smith, Southampton.*

(1) Law Rep. 11 Eq. 90. (2) Law Rep. 6 Eq. 268.

M. R.
1880
June 19.

In re SPRADBERY'S MORTGAGE.

Vendor and Purchaser Act, 1874, *s.* 4—*Transfer of Mortgage—Conveyance by Legal Personal Representative of Mortgagor.*

The 4th section of the *Vendor and Purchaser Act*, 1874, does not apply to a transfer of a mortgage; and therefore the legal personal representative of a mortgagee of a freehold estate cannot, on receiving payment of the mortgage debt, convey the estate to a transferee.

By an indenture of mortgage dated the 2nd of July, 1865, certain freehold hereditaments were conveyed by *James Spradbery* to *John Welsford Cowell* in fee by way of mortgage for securing £1500 and interest.

John Welsford Cowell, the mortgagee, died in 1865 intestate as to mortgage estates, but having made a will appointing *James Marshall Moorsom* and another his executors. His eldest son and heir-at-law was *John Jermyn Cowell*, who died in 1867, also intestate as to mortgage estates.

It was not known who was *John Jermyn Cowell's* heir-at-law.

By an indenture dated the 2nd of July, 1875, *Spradbery*, the mortgagor, conveyed his equity of redemption to *John King* in fee.

By an indenture dated the 21st of October, 1875, *James Marshall Moorsom*, the surviving executor and legal personal representative of the original mortgagee, *John Welsford Cowell*, in consideration of being paid the mortgage debt by *Thoyts* and *Lucas* at *John King's* request, assigned the same to them: and as such legal personal representative he also purported, under the provisions of the 4th section of the *Vendor and Purchaser Act*, 1874, to convey the mortgaged estate to the said *Thoyts* and *Lucas* in fee.

A question having arisen as to whether the *Vendor and Purchaser Act* applied to a transfer of a mortgage, the transferees and the mortgagor presented this petition under the *Trustee Acts*, asking that the legal estate in the mortgaged hereditaments might be vested in the transferees.

Borthwick, for the Petitioners, cited *In re Brook's Mortgage* (1).

(1) 25 W. R. 841.

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In re SPRADBERY'S MORTGAGE.

where his Lordship had held that the 4th section of the *Vendor and Purchaser Act*, 1874, did not apply to a transfer of a mortgage.

JESSEL, M.R.:—

I am of opinion that the Act does not apply to a transfer of a mortgage of a freehold estate: I will therefore make a vesting order as prayed.

Solicitors: *Lucas & Son.*

V.-C. M.
1880
May 29.

In re BRYAN.
GODFREY *v.* BRYAN.

[1878 B. 343.]

Married Woman—Equity to a Settlement—Life Interest—Benefit of Husband and Wife jointly.

A married woman has no equity to a settlement out of property given for the benefit of herself and her husband during their joint lives and the life of the survivor of them.

THE will of *Elizabeth Bryan*, dated the 11th of August, 1873, contained the following clause:—

"I give and bequeath to my daughter, *Mary Emily Godfrey*, wife of *William Valentine Godfrey*, the sum of £1000, on condition that the said £1000 shall be expended in land, or put out at interest in good Government securities, for the benefit, in yearly rents or interest (as the case may be) of the said *Mary Emily* and *William Valentine Godfrey*, during their joint lives and the life of the survivor of them. And if the said *Mary Emily Godfrey* should die without legitimate children of her own, then after the natural death of the survivor of them, I give the said principal sum of £1000, if the same be out at interest, or the land, if invested in land, to my two sons, *Hugh* and *John Henry*, equally, share and share alike. And if my said daughter, *Mary Emily Godfrey*, should die leaving legitimate children of her own, then the said principal sum of £1000, if out at interest, or the land, if invested in land, shall go to her son or daughter or sons and daughters equally; and I hereby give authority to my trustees and executors hereinafter appointed to see the said £1000 to my said daughter *Mary Emily Godfrey* secured at every stage, as herein indicated." The testatrix gave various other legacies and charitable bequests, and continued:—"If I should leave more than is sufficient to pay each and all of the said legacies and charitable bequests, together with my funeral and testamentary expenses, then such surplus shall be equally divided among my sons and daughters, share and share alike. And if either or any

of my daughters should die not leaving legitimate child or children of her own, but leaving grandchild or grandchildren, then the portion or legacy of such daughter so dying shall go to such her grandchild or grandchildren equally;" and the testatrix appointed her son, *Hugh Bryan*, and her nephew, *Robert Haynes*, trustees and executors of her will.

This was an action to administer the estate of Mrs. *Elizabeth Bryan*, and the following question was raised for the decision of the Court on the hearing of the summons of the Plaintiff, Mrs. *Mary Emily Godfrey*, on further consideration: Whether or not the Plaintiff, *Mary Emily Godfrey*, the wife of the Defendant *W. V. Godfrey*, was entitled to a settlement of the whole of her interest under the will of the deceased, or to any or what part thereof. And *W. V. Godfrey* having become bankrupt, a further question was raised whether or not the Defendant, *W. V. Godfrey*, and his trustee in bankruptcy, the Defendant, *William J. Clarke*, were each entitled to a separate set of costs of this action.

Bristowe, Q.C., and *Bardswell*, for Plaintiff:—

On behalf of the wife we claim an equity to a settlement out of this fund, which was given for the benefit of the husband and wife jointly during their lives. The husband having become bankrupt, it is clearly for the benefit of both husband and wife that there should be a settlement upon the wife. The object of the bequest was the child of the testatrix, and it was for her benefit that the legacy was given. The only object in adding the name of the husband was to give him a life interest if he survived his wife. This is a life interest in both husband and wife; but it was decided by your Lordship, in *Taunton* v. *Morris* (1), that the wife's equity to a settlement attaches as well to a life interest as to an absolute gift, and that case was affirmed on appeal (2). It is true that the cases of *Atcheson* v. *Atcheson* (3) and *Ward* v. *Ward* (4) would seem to be opposed to the right of a settlement on the part of the wife where there is a joint interest in husband and wife; but those cases are distinguishable, because the clear intention there was to benefit the husband and not the

(1) 8 Ch. D. 453.
(2) 11 Ch. D. 779.
(3) 11 Beav. 485.
(4) *Ante*, p. 506.

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wife; and moreover, those cases arose under a settlement where the words must be construed strictly, whereas this arises under a will, and you must consider what the intention of the testatrix was.

Owen, for the trustee in bankruptcy of the husband:—

It is not the wish of the trustee to act harshly towards the wife in this case, but we are bound to submit the question to the decision of the Court, and we say that the case is governed entirely by *Atcheson* v. *Atcheson* (1) and *Ward* v. *Ward* (2). The property is to be invested by the trustees, who are to pay the income to the husband and wife jointly. Under no circumstances could the wife be entitled to claim a settlement out of more than half the life estate, but even if this were admitted as a fair and reasonable arrangement, it would be out of the power of the trustee in bankruptcy to give up anything which the creditors are legally entitled to have.

J. Pearson, Q.C., *Oswald*, and *Shield*, for residuary legatees.

MALINS, V.C.:—

I am very sorry that I cannot decide in favour of the Plaintiff's equity to a settlement out of this fund, but I am bound both by authority and principle. This arises from the blundering form in which the will is drawn. The result of the will is, that £1000 is directed to be invested in land or government securities, for the benefit in yearly rents or interest of the Plaintiff *Mary Emily Godfrey* and her husband *William Valentine Godfrey*, during their joint lives, and the life of the survivor of them, with remainder to the children of Mrs. *Godfrey*. There is also a share in the residue which is given to Mrs. *Godfrey* absolutely, about which no question arises, and she will be entitled to a settlement of the whole of that sum. The only question, therefore, is whether she has an equity to a settlement of the legacy of £1000. With regard to an equity to a settlement out of a life estate, that point has already been settled by me, in the first place in the case of *Taunton* v. *Morris* (3), where I decided that a married woman has

(1) 11 Beav. 485. (2) *Ante*, p. 506.
(3) 8 Ch. D. 453.

the same equity to a settlement out of property in which she has a life interest only, as out of property in which she has an absolute interest; and that decision was affirmed on appeal (1). If, therefore, this legacy had been given to Mrs. *Godfrey* for life only, the case of *Taunton* v. *Morris* (2) would have applied, and I should have had no hesitation in giving her the whole of the income, but unfortunately that is not the gift here. The terms of this bequest are that the sum of £1000 is to be invested for the benefit of the said *Mary Emily* and *William Valentine Godfrey*, during their joint lives and the life of the survivor of them. Property given to a wife only is subject to an equity of settlement, but not so where it is given to a husband and wife jointly, for then it is in fact the property of the husband, the husband and wife being one in law, and the husband takes the property. In the absence of any authority I should have decided that the equity to a settlement did not attach to this property. But there are two cases which go directly to the point. The first is *Atcheson* v. *Atcheson* (3), where the wife claimed to be entitled to a settlement out of property to which the husband and wife were jointly entitled, and it was decided that she was not so entitled, but that the property must be carried to their joint account, and that the dividends must be paid to the husband during the joint lives of himself and his wife.

The same point has been decided very recently by the Master of the Rolls in the case of *Ward* v. *Ward* (4). Upon a marriage the lady's father covenanted with the trustees to pay to them during his life an annuity of £60, and the trustees were to stand possessed thereof upon trust to pay the same "unto and to the use of the husband and wife during their joint lives," with trusts over for the survivor, and for the children of the marriage. It was there held that there was a tenancy by entireties, under which the whole of the annuity was payable to the husband, and passed to his judgment creditor, and that the wife was not entitled to claim her equity to a settlement out of any part of it.

In the face of those two authorities I could not come to any other conclusion than that the Plaintiff Mrs. *Godfrey* has no

(1) 11 Ch. D. 779.
(2) 8 Ch. D. 453.
(3) 11 Beav. 485.
(4) *Ante*, p. 506.

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equity to a settlement out of the £1000, and the income must be paid to the trustee in bankruptcy during the joint lives of Mr. and Mrs. *Godfrey*, and to Mr. *Godfrey*, if he should be the survivor.

As to the costs, I think it was a fair question to raise, and the costs of all parties ought to be paid out of the estate.

Solicitors for Plaintiff and Defendant *Godfrey*: *Layton & Jaques.*

Solicitor for Defendant *Bryan*: *W. Crook*, agent for *Hough & English, Oakham.*

Solicitors for *W. H. Bryan*, a residuary legatee: *Lousada & Emanuel*, agents for *R. & W. T. Shield, Uppingham.*

Solicitor for Trustee in Bankruptcy: *Metcalfe.*

METROPOLITAN BOARD OF WORKS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

V.-C. H. 1880 Feb. 10, 11.

[1877 M. 183.]

Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 135—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 61—*Metropolitan Main Drainage—Metropolitan Area, Persons outside—Right to use Drainage—"Any Person making or branching Sewer."*

The *Metropolis Management Act*, 1855, vested in the Plaintiffs an open sewer, called the *Stamford Brook*.

The *Metropolis Management Amendment Act*, 1862, s. 61, enacted that no person should make or branch any sewer or drain, or make any opening into any sewer vested in the Plaintiffs without their consent; but provided that "any person" might with such consent at his own expense make or branch any drain into any such sewer in such manner as the Plaintiffs should direct.

After the passing of the Act of 1855, the Plaintiffs allowed four old cottages belonging to the Defendants, on land just outside the metropolitan area, to continue to drain through an 18-inch brick drain into *Stamford Brook*. They subsequently, at the request of the Defendants, who paid half the cost, covered in the brook, and converted it into a main sewer. When they did this, they made an opening in the newly-covered-in sewer as a communication for the 18-inch drain.

The Defendants, having built other cottages outside the area, claimed the right to use this communication for the drainage of such new cottages:—

Held, that the words "any person" in the 61st section of the Act of 1862 must be construed as meaning "any person" entitled to the benefits of the Act, and accordingly as limited to owners or occupiers within the metropolitan area:

Held, also, that the drainage from each additional cottage or building was a separate making or branching of a drain within the meaning of the section:

Held, further, that the Plaintiffs had no power to contract to admit buildings outside the metropolitan area into their drainage systems.

Injunction granted to restrain the Defendants from permitting their additional cottages, or any buildings other than the four old cottages, to drain into the *Stamford Brook*.

Affirmed by C. of A. 17 Ch D. 246 & ca

THE 135th section of the *Metropolis Management Act*, 1855 (18 & 19 Vict. c. 120), vested in the Metropolitan Board of Works certain sewers therein specified, amongst which was a brook or natural watercourse known as *Stamford Brook*.

This brook, which was in fact a road-side ditch, commenced at a

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point on the boundary between the parishes of *Hammersmith* and *Acton*, about 100 feet north-east of the *Old Oak Bridge* over the *North Western Railway*, and ran alongside a lane called the *Old Common Lane;* during part of its course it divided the parish of *Acton*, which is outside the area under the control of the Metropolitan Board of Works, from the parish of *Hammersmith*, which is within that area, and it entered the metropolitan area near the *Willesden Junction* of the *London and North Western Railway*.

About fifteen years before the passing of the Act of 1855, four cottages fronting to *Old Oak Common Lane* had been built on the west side of the *Stamford Brook*, in the parish of *Acton*, and these four cottages, as well as the surface drainage of the adjoining land, drained into the brook, which at the time of the passing of the Act was still an open ditch.

The 135th section of the Act, after vesting the *Stamford Brook* and other sewers as above mentioned, enacted that the Board of Works should make all such sewers and works as they thought necessary for preventing the sewage of the metropolis from passing into the River *Thames* near the Metropolis, causing them to be completed before the 31st of December, 1860, "and shall also make all such other sewers and works and such diversions or alterations of any existing sewers or works vested in them under this Act as they may from time to time think necessary for the effectual sewerage and drainage of the Metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this Act as they may deem unnecessary;" and the section further gave powers to the board as to the repair and maintenance of the sewers, and directed them to cause the sewers vested in them to be covered up so as not to be a nuisance or injurious to health.

By the 77th section of the same Act it was enacted as follows:— "It shall be lawful for any person at his own expense to make or branch any drain into any of the sewers vested in the Metropolitan Board of Works, or any vestry or district board under this Act . . . . such drain being of such a size and of such conditions and branched to such sewer in such a manner and form of communication in all respects as the vestry or board shall direct

or appoint; and in case any person make or branch any drain into any of the said sewers so vested in the vestry or board, or authorized to be made by them under this Act, of a larger size or of different conditions, or in a different manner and form of communication than shall be directed or appointed by the vestry or board, every person so offending shall for every such offence forfeit a sum not exceeding £50."

By the 61st section of the *Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. c. 102), it was enacted as follows:—"The 77th section of the firstly recited Act" (the Act of 1855), "is hereby repealed; and in lieu thereof be it enacted, that no person shall make or branch any sewer or drain, or make any opening into any sewer vested in the Metropolitan Board of Works, or in any vestry or district board, without the previous consent in writing of such board or vestry: Provided that it shall be lawful for any person, with such consent, at his own expense, to make or branch any drain into any sewer vested in such board or vestry . . . . such drain being of such size, materials, and other conditions, and branched into such sewer in such manner and form of communication in all respects as the board or vestry shall direct or appoint." The section then went on to impose a penalty of £50 upon "any person" acting in contravention of this enactment. In pursuance of the Act the Plaintiffs constructed a system of drainage for the metropolis as thereby defined, and as part of such system the sewage and drainage passing through the *Stamford Brook*, east branch, was pumped up first at the pumping station in *Pimlico*, and ultimately at *Abbey Mills*, in *Essex*.

In the year 1857 the Defendants purchased a piece of land in the parish of *Acton*, upon which the above-mentioned four cottages in *Old Oak Common Lane* stood, and in the year 1868 they built for the accommodation of their servants upon land they had purchased in the parish of *Hammersmith*, four cottages, also fronting *Old Oak Common Lane*, and the sewage from all these eight cottages drained into the *Stamford Brook*.

In 1871 a fever broke out amongst the occupiers of these eight cottages, and a correspondence took place between the Defendants and the Plaintiffs, in which the Defendants urged the Plaintiffs to cover in the *Stamford Brook*, and the Defendants objected that

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the wants of the locality did not justify the expense. Ultimately the Defendants agreed to pay the sum of £518 10*s.*, one-half the estimated expense, and the Plaintiffs undertook to accept the contribution and execute the necessary works.

This sum the Defendants paid, and the Plaintiffs accordingly covered in the brook, and converted it into a main sewer, making, by means of a drain eye, a communication between the newly-covered sewer and an 18-inch brick drain, through which the sewage from the four cottages in the parish of *Acton* had formerly passed into the brook.

The Defendants had recently built twenty-nine new cottages in *Old Oak Common Lane* upon the *Acton* side of the brook or main sewer, and they were proceeding to connect these new cottages with the 18-inch brick drain through which the old cottages on the *Acton* side drained into the Plaintiff's system. The Plaintiffs, however, objected that as these new cottages were situated outside the metropolitan area, they were not entitled to drain into their drainage system, and they accordingly brought the present action, and claimed an injunction to restrain the Defendants from causing or permitting any sewage from the twenty-nine cottages or any premises outside the metropolitan area, other than the four old cottages in the parish of *Acton* above mentioned, to flow or be discharged, directly or indirectly, into *Stamford Brook*, or any other sewer vested in or under the control of the Plaintiffs.

W. Pearson, Q.C., and *Everitt*, for the Plaintiffs.

Morgan, Q.C., and *Speed*, for the Defendants:—

It is quite true that the 61st section of the *Metropolis Management Act*, 1862, prohibits any person from making, without the consent of the board, any opening into any sewer vested in them. The Defendants have not, however, done this prohibited thing. The section goes on to make it lawful for "any person"—and there is nothing in the Act to confine it to "any person within the metropolitan area"—with the consent of the board and at his own expense to make or branch any drain into any of the sewers vested in the board. In the present case the board, after permitting the sewage from the Defendants' four cottages outside

the area for many years to pass through their sewer, themselves made the opening when they covered in the sewer. The 77th section of the Act of 1855 and the 61st section of the Act of 1862 enable the Plaintiffs to admit anybody they please to the benefit of their system of drainage on such terms as they think proper. They have admitted the right of our four old cottages to drain, as they had done for forty years, through *Stamford Brook*, although they are outside the area, and having done so, they cannot limit our rights to those four cottages only. We do not claim by virtue of an easement, for of course we could not increase the burden of the servient tenement, but we claim as riparian proprietors, owners of land on both sides of this flowing stream from *Harlesden* to *Hammersmith*, the right to drain into it; and our right cannot be confined to any one house or number of houses, for a riparian proprietor may build a city where only a mansion-house has stood. It is too late for the Plaintiffs to contend that their admission of the Defendants was *ultrà vires*, or limited to the four houses, for the Defendants have paid one-half of the total cost of covering in the brook, and the correspondence which took place at the time, and the amount they paid, shew that their rights were never intended to be limited to the four cottages only, and in fact constituted a contract that the Defendants should be admitted for all purposes to the benefit of the main drainage system.

Yate Lee watched the case on behalf of the Local Board for *Willesden*.

There were other contentions raised on behalf of the Defendants, but the foregoing alone require a report.

HALL, V.C.:—

It appears to me that the Plaintiffs' case is established subject to the qualification to which they are willing to submit, that the order to be made is not to extend to interfere with the drainage of the four cottages as enjoyed at the time when the Act of 1855 was passed. Any claim by the Defendants of an easement with reference to the four cottages, with or without extending that

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easement to any additional buildings (if in that expanded character it could be considered an easement), has been entirely discarded, if, indeed, it was ever intended to be brought forward. The Defendants do not claim in that way: and they could not do so, for there has been unity of ownership in the property out of which the easement is claimed, and the property in respect of which it is claimed, and therefore there is no easement at all. That clears away the ground so far. But it is said if that be so, how is it that the Plaintiffs make this concession as to the four cottages only? If they make this concession as to the four cottages, they can shew no good reason why they are not in the same position as to all the other cottages and buildings belonging to the Defendants, which are likewise outside the metropolitan area, and therefore not liable to contribute to the expense of the main drainage. But the Plaintiffs might very well say in answer, and this without any inconsistency, "It is true that under the circumstances you had no right in respect of the four cottages, but you have in fact exercised against us for some considerable time a right with regard to them which we had no power to give you, but under the circumstances we do not think that we ought to interfere with your enjoyment of that right." The argument that this concession in any way estops the Plaintiffs from denying to the Defendants the same right in respect of other property appears to me neither logical nor sound. The main question is presented on the part of the Defendants substantially in this way. They say, "You the Metropolitan Board had a right to allow us to let these four cottages and also any other buildings on our land outside the metropolitan area drain into your main sewer. Having that right, when you were covering over the ditch and constructing your works you found that there had been a communication with the four cottages by means of the 18-inch drain, and, finding this communication, you allowed it to remain, and you constructed something equivalent to an ordinary eyehole. By doing this you assented to this communication remaining there and being used thereafter for all purposes for which we the Defendants (who have already used it for the four existing cottages) may desire to use it, that is, for all or any houses which we may think fit to erect on our ground out-

side the metropolitan area." They say, "We were induced by your taking that course, and by the negotiations which took place between us with reference to covering in the old drain, to pay you one-half of the cost, and that amounted to and was intended to constitute a contract between us; and it is a great grievance to us after all this to be excluded from participating in the main drainage."

I must, however, consider what is really the position of the Metropolitan Board of Works with reference to persons outside the metopolitan area. That is an important general question, and it depends first of all, and mainly, upon the construction to be put upon the 135th section of the Act of 1855, which vests in the board the sewers therein specified, of which the sewer in question is one. [His Lordship then read that section, and continued:—]

Under that section unquestionably this very sewer vested in and became the property of the Metropolitan Board, and they were authorized to stop up and discontinue it if they should deem it unnecessary, that is to say, they might under this section actually discontinue this particular sewer, which it is said was only vested in them subject to the Defendants' rights and interests. Now those rights, as I have mentioned, are only such as have accrued by actual enjoyment (a title which the Defendants, in fact, disclaim) or by contract. They are not vested in them under any contract which has been entered into, first, because the correspondence not only contains nothing which could be deemed a contract, but negatives the existence of any contract at all. The letters point to this, that the board, in making their arrangement with the company, founded it on this, that the persons whose interests were to be considered in what was about to be done were the then existing occupiers upon the banks of this stream; nothing was done or said with reference to any future buildings or to any increase in the number of the occupiers affected by what was to be done or left undone. It is said the company paid a ridiculous price if no more than that was meant, and the arrangement had reference to nothing else than the four cottages. I cannot say whether or not the company acted wisely in paying that sum for such an arrangement. It may be they were willing to pay the sum in the hope that it might support the claim they

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are now, in fact, putting forward, to have the benefit of the metropolitan main drainage system for their land, so that they, being outside the metropolitan area, should not be handed over to the district board and left to negotiate for such drainage as they could get. But, whatever their views might be, that cannot vary the rights of the parties. Mr. *Osborne Morgan* has said it was quite competent for the board to make this arrangement. But it appears to me that an arrangement such as that which the Defendants set up, namely, one for letting in persons not intended to be benefited by this Act of Parliament, and the whole of whose lands were meant to be left out of the metropolitan drainage system, was not within the scope or competency of the board to enter into. It is of the greatest importance to the board and the public, whom they represent, that this Act of Parliament should not be construed so as to enable a large number of persons outside the defined metropolitan area to come in and have the benefit of it, so that the effect would be, as Sir *Joseph Bazalgette*, one of the witnesses, has said, to let in as participators in the metropolitan drainage system, persons not within the metropolis, and thus render the scheme of drainage which has been carried out by the Metropolitan Board insufficient for the required purposes. Therefore, on the question of actual injury and damage, as between the Board on the one hand and the company, as proprietors of these lands, on the other, the preponderance seems to be greatly in favour of the Metropolitan Board. It is said that the Act of Parliament uses language wide enough to embrace anybody, and that the words "any person" apply to and include the Defendants. But I must read these words "any person," with reference to the scope and provisions of this Act of Parliament, as a whole; and "any person" must, in my judgment, be taken to mean throughout all these sections any person entitled to participate in or make arrangements with the board with regard to the user of the drainage system and the benefit of the Act of Parliament. I feel no difficulty whatever in saying that that is the true construction of the Act of Parliament. Then it is said that what is interdicted by this Act of Parliament is the making of openings, and the Defendants refer to the 61st section of the *Amendment Act*, 1862 (25 & 26 Vict. c. 102), which repeals the

77th section of the former Act, and substitutes another enactment. [His Lordship then read the 61st section.]

The Defendants say, We are within our right; we did not make this opening; we are only draining into an opening which you made. But it appears to me that each drainage from each house or each building is in itself for this purpose a separate making or branching of a sewer or drain, *i.e.*, the sewer or drain of the particular building, into the sewer of the Metropolitan Board. Therefore that ingenious suggestion entirely fails; and all the defences raised against the claim of the Metropolitan Board are unsubstantial, and are met and answered as I have mentioned. Therefore, with the qualification I have mentioned, the injunction which is prayed for must be granted.

Solicitor for Plaintiffs: *William Wyke Smith.*
Solicitor for Defendants: *R. F. Roberts.*

DEWAR *v.* BROOKE.

[1868 D. 19.]

Will—Construction—Trust for Sons at Twenty-five—Direction to pay when youngest Child attained Twenty-one—Gift of Intermediate Income for Maintenance—Discretionary Power—Vested or Contingent Interest.

A testator directed his trustees to hold a trust fund upon trust for "all his children or any his child who being sons or a son should attain twenty-five, or being daughters or a daughter should attain twenty-one or marry, and if more than one, in equal shares, and to be divided and paid on the youngest of his said children attaining twenty-one"; and he empowered his trustees to apply "the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child." The testator had only two children, the elder a son, and the younger a daughter. Upon petition by the son, presented after the daughter had attained twenty-one but before he had himself attained twenty-five:—

Held, that his interest under the will was not vested, but contingent on his attaining twenty-five.

Fox v. *Fox* (1) distinguished.

PETITION in an administration action.

James Dewar, by his will, dated in 1866, after specific and

(1) Law Rep. 19 Eq. 286.

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pecuniary bequests, gave and bequeathed his real and residuary personal estate to trustees upon trust for sale, conversion, and investment, and then proceeded as follows: "Subject to the preceding trusts and directions my trustees shall stand possessed of my said estate in trust for all my children or any my child who being sons or a son shall attain twenty-five, or being daughters or a daughter shall attain the age of twenty-one years or marry, and if more than one in equal shares, and to be divided and paid on the youngest of my said children attaining twenty-one years, and the share of each of my daughters to be for her separate use with remainder to their children equally, and in default of children for such person or persons as she shall by will or codicil appoint. I empower my trustees to raise any part not exceeding one-half of the vested or presumptive share of a child or remoter issue, and apply the same for his or her advancement. I empower my said trustees to apply the whole or such part as they shall think fit of the annual income to which any child or remoter issue shall be entitled in expectancy towards the maintenance or education of such child."

The testator, who died in 1867, had issue two children only, viz., the Petitioner, *David Douglas Dewar*, who was born on the 17th of December, 1856, and was now of the age of twenty-three years, and *Jessie Ethel Dewar*, who was born on the 11th of September, 1858.

During the infancy of *Jessie Ethel Dewar* an administration action was instituted on her behalf against the Petitioner and the trustees, in the course of which the estate of the testator had been administered and the clear residue thereof ascertained, under the direction of the Court, at the sum of £49,000.

Jessie Ethel Dewar attained twenty-one in September, 1879, and the Petitioner, being about to marry, and being desirous of making a settlement on his marriage, now presented this petition, praying, 1. for a declaration that according to the true construction of the will of the testator his residuary estate became divisible and payable on his daughter, the youngest child, attaining twenty-one, in equal shares between her and the Petitioner, as the only children of the testator, and that their respective shares might be ascertained and divided and paid accordingly; or 2. in the alternative, that the trustees might be directed to and might raise

one-half part of the Petitioner's vested or presumptive share of the testator's residuary estate, and apply the same for his advancement, he being willing and thereby offering that such one-half part should be settled upon certain trusts for himself, his intended wife, and the issue of the intended marriage therein specified; and that the trustees might be directed to pay the income arising from the other half part of the Petitioner's vested or presumptive share to the Petitioner towards his maintenance.

W. Pearson, Q.C., and *W. W. Cooper*, for the Petitioner:—

First. A gift to a child at a given age, coupled with a direction that the income shall be applied for his maintenance until the attainment of that age, confers a vested interest upon the child, even though the trustees have a discretion as to the amount of the income to be so applied: *Fox* v. *Fox* (1).

Secondly. There is here an express declaration that the children's shares shall be divided and paid on the youngest of them attaining twenty-one, and this event has already happened. Accordingly, the Petitioner is now absolutely entitled to one moiety of the testator's residuary estate.

Hastings, Q.C., and *Harvey*, for the Respondents, were not called upon.

HALL, V.C.:—

The trust here is for children who being sons or a son attain twenty-five, or being daughters or a daughter attain twenty-one or marry. In *Fox* v. *Fox* the trust was a trust for sons "as and when" they attain twenty-five. Here a son who has not attained twenty-five is not one of the *cestuis que trust*. The maintenance clause is not inconsistent with a son under twenty-five not being a *cestui que trust*, it providing for the maintenance of children entitled to income in expectancy. In *Fox* v. *Fox* the maintenance clause did not describe the child as a child who was entitled to income in expectancy, but was in these terms: "applying from time to time the income of the presumptive" share "of each child (if more than one) or the income" of the whole "if an only child, or

(1) Law Rep. 19 Eq. 286.

V. C. H. 1880 DEWAR v. BROOKE.

so much thereof respectively as the trustees or trustee for the time being might think proper to and for his and her maintenance and education, until such share or entirety, as the case might be, should become payable as aforesaid." I think I should be departing from the ordinary meaning of the words used in this will if I were to hold that by force of the maintenance clause, which is what is mainly relied upon for the Petitioner, the Petitioner is entitled to a vested interest. With regard to the payment and division being directed at the time when the youngest child attains twenty-one years, that direction may, and I think does, mean that actual division and payment shall not take place until the youngest attains that age: the testator says, in effect, that there is not to be payment or division until the youngest attains twenty-one; *i.e.*, you are to wait for that event before you make payment and division, and when that happens you are to make payment and division; such payment and division being, however, necessarily subject to postponement or incomplete in reference to any sons who may be under twenty-five, and as to daughters, it is observable that when the youngest child attains twenty-one there might be included in the division a daughter who was not twenty-one but had married. As to *Fox* v. *Fox* (1), it may in some other case have to be determined whether it is in conflict with the decision of the Lord Justice *James* in the case of *In re Ashmore's Trusts* (2), and if so, which decision is to be followed.

Solicitors for Petitioners: *Pickett & Mytton.*
Solicitor for Respondent: *T. M. Harvey.*

(1) Law Rep. 19 Eq. 286. (2) Law Rep. 9 Eq. 99.

In re ANGLO-FRENCH CO-OPERATIVE SOCIETY.

V.-C. H.
1880
April 15.

Contempt—Attachment—Member of late Parliament—Privilege.

On a motion for attachment of a member of the Parliament which was dissolved on the 24th of March, for contempt in not obeying an order of the Court to pay certain moneys, &c., to the liquidator of the company :—

Held, that the rule laid down in *Goudy* v. *Duncombe* (1), that a member of Parliament was entitled to privilege from arrest for forty days both after and before the meeting of Parliament, and whether after a prorogation or a dissolution, applies to a person who was a member of the old, but is not a member of the new, Parliament.

THE *Anglo-French Co-operative Society, Limited,* was in the course of liquidation. An order was, on the 24th of February, 1880, made, at the instance of the liquidator, that Mr. *J. Fortescue Harrison,* who was in the Parliament which was prorogued and, later in the day, dissolved on the 24th of March, a member of the House of Commons, should within four days deliver up to him on oath all moneys, documents, property, and effects of the society which had come to his possession since the commencement of the winding-up. On the 24th of March a motion was made on the part of the liquidator to commit Mr. *Harrison* for contempt in not complying with the order of the Court. The new Parliament, for the election of members to which the writs were issued in the evening of the 24th of March, was ordered to meet on the 29th of April. The Vice-Chancellor held that the objection that Mr. *Harrison* was a member of the House of Commons and protected from arrest was well founded, and the motion was refused with costs. A renewed notice of motion for the same purpose was given for Tuesday the 6th of April, and notice was also given that the affidavits which were used on the 24th of March would be read as against Mr. *Harrison.* On the 6th of April the motion was saved, and it came on to be heard on the 15th of April (the next motion day).

Alexander Young, for the liquidator :—

Mr. *Fortescue Harrison* is not now a member of Parliament, nor

(1) 1 Ex. 430.

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has he been a candidate for any constituency, and I now move for an order of committal for his contempt.

Hastings, Q.C., and *MacSwinney*, for Mr. *Harrison* :—

We have a preliminary objection to the motion being heard. This is an attempt to obtain a rehearing of a motion which was disposed of on the 24th of March, as no new affidavits have been filed; and it is submitted that Mr. *Harrison* is still entitled to his privilege of Parliament, and will be for forty days after the dissolution, though he has not been elected a member of the new Parliament. The authorities shew that there must be a convenient time—a time certain—allowed to enable a member to return home, and that time has been, it is submitted, for at least two centuries, forty days. It has never been decided how short a time is to be allowed to go home. The period of forty days has never been cut down, and the same period is allowed whether after a prorogation or a dissolution, and after and before the meeting of Parliament: *Goudy* v. *Duncombe* (1). The words used in the books are "*eundo morando et redeundo*." Notice of this motion was given for the 6th of April, and it cannot be held that the meaning of those words will be satisfied by the short period between the 24th of March and that date. To do so will be cutting down the forty days to a very short time. The days which have elapsed since the 6th of April cannot be taken advantage of. Forty days were allowed to Mr. *Duncombe*, who resided in *Mayfair*, and who was member for *Finsbury*. The only authorities upon the point are Sir *Erskine May's* Parliamentary Practice (2); *Butcher* v. *Steuart* (3); *Sir Richard Temple's Case* (4); *Earl of Athol* v. *Earl of Derby* (5); *Colonel Pitt's Case* (6); and *Barnardo* v. *Mordaunt* (7); and it is submitted that upon both grounds the motion must be refused.

Alexander Young, in reply :—

The convenient time to be allowed after a dissolution and in such a case as this has never been expressly defined either by

(1) 1 Ex. 430.
(2) Page 132.
(3) 11 M. & W. 857. 4 Prynne Reg. 1216.
(4) 1 Sid. 42.
(5) 2 Lev. 72.
(6) 1 Str. 985.
(7) 1 Ld. Ken. Rep. 125.

Parliament or by the Courts of Law. Mr. *Harrison* resides at *Richmond, Surrey*, though he was a member for the *Kilmarnock* Burghs. The privilege was allowed in order that a member might attend to his duties in Parliament, but Mr. *Harrison* is not now a member, and therefore his services are not required. Mr. *Duncombe's* case was totally different, as the dissolution of Parliament took place on the 23rd of July and he was re-elected on the 28th of July, and at the time of his arrest, on the 2nd of September following, he was a member of Parliament. In the cases which have been referred to the persons arrested produced their returns as members of Parliament. It is for the Court to decide what would be a reasonable time to enable a late member to get home, and twenty-two days have already elapsed since the dissolution. The old authorities are not in these days of rapid locomotion binding on the Court. It cannot be shewn that Parliament ever claimed forty days, and in the case of Mr. *Duncombe* there is nothing but statement for which no authority was cited, and the case was so decided because Mr. *Duncombe* was at the time a member of Parliament. I submit, therefore, that the privilege claimed by Mr. *Harrison* is gone, and that he ought to be committed.

[Sir *Erskine May's* Parliamentary Practice (1) and the case of Mr. *Long Wellesley* (2) were referred to.]

Hall, V.C. :—

The question to be considered is whether Mr. *Harrison*, who was but is not now a member of Parliament, can claim the privilege on the ground that by the law of Parliament members are allowed some time to return home. What time does the law of Parliament allow for "*redeundo*"? Is it a convenient time to be measured by the actual place of a member's residence, and am I to ascertain what would be a reasonable time to enable him to go home? I do not entertain the view that any time must be allowed to any person in respect of the possibility of his getting into Parliament. This gentleman is not in Parliament when this application is made. What is the time to be allowed? Is the Court to consider what would be reasonable for going home? I have been asked to make a calculation in reference to certain

(1) Pages 131, 134, 136. (2) 2 Russ. & My. 639, 658, 660.

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places—*Wick*, for instance—and to say what would be a convenient time for getting there. It seems to me that there has been a tradition that forty days is the time to be allowed, and there is one case, *Goudy* v. *Duncombe* (1), in which the *quantum* of time was discussed and dealt with by the Court. It was there laid down that both after and before the meeting of Parliament, and whether after a prorogation or a dissolution, that period should be allowed to a member. That was the judgment of the Court of Exchequer, and, there being that authority, I must act upon and follow it: therefore I hold that this notice of motion was irregularly given and must be refused. As to the other point, that the motion was heard and disposed of on the 24th of March, and that this is an attempt to obtain a rehearing, I hold that that objection cannot prevail. The application was made because of non-obedience to an order, and it was refused because the Respondent shewed that he was privileged, but the refusal of that application is no bar to another application if made at a time when the Respondent is no longer entitled to claim the privilege; a notice of motion may be given when the privilege shall have expired by lapse of time, if the contempt be continuing.

On the question of costs,

Alexander Young asked that Mr. *Harrison* might be ordered to pay his own costs out of the moneys of the society in his hands: *Hope* v. *Carnegie* (2).

Hall, V.C.:—

I have not been dealing with the conduct or misconduct of the Respondent, but with the question of privilege, and as the motion has failed, the liquidator is not absolved from having to pay the costs of it.

Solicitors: *John Holmes; W. Rawlins.*

(1) 1 Ex. 430.

(2) Law Rep. 4 Ch. 264.

RAINS *v.* BUXTON.

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1880

April 19.

[1879 R. 129.]

Statute of Limitation—Adverse Possession—Concealed Fraud—Discontinuance —Cellar under Ground—3 & 4 Will. 4, c. 27, s. 26.

Under the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, the right to land is extinguished, in the absence of fraud, after a discontinuance of possession for the period enacted in the statute, although the owner so discontinuing possession was unaware that adverse possession had been taken.

If *A.* has occupied a cellar under the ground of *B.* for sixty years, this is, in the absence of fraud, a discontinuance of possession on the part of *B.* within the meaning of the statute, though *B.* was ignorant of such occupation.

THE Plaintiffs in this action sought to restrain the Defendants from executing certain works so as to interfere with a cellar which was in the possession of the Plaintiffs for sixty years, under land belonging to the Defendants. The predecessors in title of the Plaintiffs were proved to have been in possession of the cellar more than sixty years before the commencement of the action.

The Defendants' contention was that the possession of the predecessors in title of the Plaintiffs had been taken secretly, and without the knowledge of the Defendants, who could not, therefore, be said to have discontinued their possession within the meaning of the *Statute of Limitations*.

Cookson, Q.C., *Everitt*, and *Lockwood*, for the Plaintiffs:—

The Defendants' right to the cellar is barred by the *Statute of Limitations*, 3 & 4 Will. 4, c. 27. This is not a case of "concealed fraud," and therefore sect. 26 does not prevent the time from running. "Concealed fraud" means "designed fraud": *Petre* v. *Petre* (1).

[FRY, J., referred to *Trotter* v. *Maclean* (2).]

Partridge v. *Scott* (3) and *Angus* v. *Dalton* (4) shew the nature of the right to support by the land of a neighbouring landowner, and the extent to which a grant will be inferred. In order that a grant

(1) 1 Drew. 371, 397.
(2) 13 Ch. D. 574.
(3) 3 M. & W. 220.
(4) 4 Q. B. D. 162, 186.

FRY, J. 1880 RAINS v. BUXTON.

of a right to support may be inferred, it is enough that the person against whom the right is alleged knew, or had the means of knowing, of the user.

North, Q.C., and *Cracknall*, for the Defendants:—

The Defendants were ignorant of the existence of the cellar until just before this action was commenced. If the *Statute of Limitations* applies at all, then this is a case of concealed fraud, and sect. 26 prevents time from running against the Defendants until the discovery of the fraud. On this point we admit that *Trotter* v. *Maclean* (1) is an authority against us. But the statute has no application at all. There has been no discontinuance of possession by the Defendants or their predecessors within the meaning of sect. 6 of the Act.

Lord *St. Leonards*, in his Treatise on the Real Property Statutes, says (2): "To constitute discontinuance there must be both dereliction by the person who has the right; and actual possession, whether adverse or not, to be protected." There is no evidence that the Defendants or their predecessors ever gave up possession of the space occupied by the cellar. The ownership and possession of the surface of the land carries with it the possession of the subsoil. If a trespasser has secretly removed minerals out of a mine, the vacant space left does not become his by lapse of time. In such a case the only thing which the trespasser requires is the minerals which he actually removes: *Earl of Dartmouth* v. *Spittle* (3). There can be no discontinuance of possession, *i.e.*, a giving up of possession by the real owner and a taking of possession by some one else, when the wrongful possession is taken secretly: *McDonnell* v. *McKinty* (4); *Smith* v. *Lloyd* (5). The statute cannot apply unless there was knowledge by the Defendants or their predecessors in title of the existence of the cellar: *Searby* v. *Tottenham Railway Company* (6); *Adnam* v. *Earl of Sandwich* (7); *Ashton* v. *Stock* (8); *Norton* v. *London and North Western Railway Company* (9).

(1) 13 Ch. D. 574.
(2) 2nd Ed. p. 33.
(3) 19 W. R. 444.
(4) 10 Ir. L. Rep. 514, 526.
(5) 9 Ex. 562.
(6) Law Rep. 5 Eq. 409.
(7) 2 Q. B. D. 485, 489, 490.
(8) 6 Ch. D. 719, 726.
(9) 13 Ch. D. 268, 271, n.

Cookson, in reply, referred to *Leigh* v. *Jack* (1).

FRY, J.:—

The Defendants say the Plaintiffs have no title, while the Plaintiffs say they have a title under the *Statute of Limitations*, and it becomes therefore material to consider what the *Statute of Limitations* says with regard to such a point.

The 2nd section enacts, that no person shall bring an action to recover any land except within twenty years next after the time at which the right to bring such action shall have accrued to the person who brings such action, or, putting it shortly, to himself.

Then the 34th section enacts, "that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

The 3rd section enacts, "That in the construction of this Act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinbefore is mentioned, (that is to say) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

The latter part of the clause I need not investigate. It appears to me that when actual possession by the Plaintiffs' predecessors in title commenced, the Defendants' predecessors in title must be deemed either to have been dispossessed or to have discontinued the possession. In my view, the difference between dispossession and the discontinuance of possession might be expressed in this way—the one is where a person comes in and drives out the others

(1) 28 W. R. 452. W.N.(1879) 204

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from possession, the other case is where the person in possession goes out and is followed into possession by other persons. Whichever be the true view in this case, there being an actual possession for upwards of sixty years, it appears to me the statute clearly applies.

The Defendants say that is not so, that although the statute is express with regard to fraud, and is silent with regard to default or negligence on the part of the person who was originally in possession, yet that no possession operates under the statute to give a title unless that possession by the person claiming title has been in consequence of the negligence or default of the other, and, as I understand them to argue, that that negligence or that default must be proved affirmatively by the person who seeks to avail himself of the statute. But to come to such a conclusion as that would be to import a new and very onerous condition into the statute.

Even if such negligence or default has to be proved, the burden of proof must, in my judgment, rest on the Defendants: but here there is a total absence of evidence on their part to shew under what circumstances possession was taken. Therefore, whether there were or not neglect or default on the part of the original possessors of the cellar, I do not know, and I repeat I certainly cannot hold that the Plaintiffs are bound to prove such neglect or default on the part of the original possessor.

Another argument which has been pressed upon me is this:—it is said that even if the *Statute of Limitations* applies in the manner I have now determined it does, yet that the Defendants' right is saved by the 26th section, which applies to cases of concealed fraud, and gives a right to the person against whom that concealed fraud has been perpetrated to recover the land—that it preserves or saves the right. Now in this case, as I have pointed out, there is no evidence of the circumstances under which the cellar was made, and if the Defendants claim the benefit of a reservation of their rights on the ground of concealed fraud, it would be for them to prove two things, fraud and the concealment of the fraud, because both are essential to their case.

It is said on behalf of the Defendants that they have sufficiently supported that case of fraud by the proof of this fact, that the

cellar was underground: and what is presented to me is this, that that being an underground cellar is evidence of concealed fraud unless the Plaintiffs can prove that they gave notice of it, although, as in this case, it was used openly, the door into the cellar being quite visible to anybody. The door opened outwards into the area, so that it was always visible to any person who chose to look down the area, and no effort whatever was made or any step taken to produce concealment, although, no doubt, from its very nature it was not perhaps a thing at all times necessarily seen. I am bound to say those facts do not prove concealment.

I do not know at all whether the cellar was made with the permission of the predecessor in title of the Defendants or not, and there is an entire absence of proof of the fact of concealed fraud.

I therefore hold that the Plaintiffs are by virtue of the *Statute of Limitations* entitled to that cellar, and the Defendants, having intended to destroy something like half that cellar by their operations, were intending a wrong in respect of which the Plaintiffs are entitled to an injunction.

His Lordship then granted an injunction in the terms of the prayer in the statement of claim, and gave the Plaintiff the costs of the action, the Plaintiffs accepting by agreement the sum of £50 in lieu of an inquiry as to damages.

Solicitors: *Layton & Jaques,* agents for *J. Hill, Manchester; F. C. Greenfield,* agent for *S. Leech, Derby.*

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Feb. 26, 27; *March* 3,4; *May* 31.

17 Ch D 179
23 Ch D 356
24 Ch D 491

FRITZ *v.* HOBSON.

[1879 F. 143.]

Public Nuisance—Particular Injury to Individual—Unreasonable Use of Highway—Obstruction of Landowner's Access to Highway—Damages—Loss of Custom in Trade—Damages accrued after issue of Writ—Lord Cairns' Act (21 & 22 *Vict. c.* 27), *s.* 3—*Practice—Costs—Motion adjourned to Trial—Omission to ask for Costs at Trial—Amendment of Judgment—Liberty to apply—Order* 41*a* (*Dec.* 1879).

When the private right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable user of the highway he is entitled to recover damages from the wrongdoer in respect of loss of custom in the business which he carries on in his house. He is entitled also to recover damages on the ground that he has suffered a particular injury from a public nuisance.

Rose v. *Groves* (1) and *Lyon* v. *Fishmongers' Company* (2) followed.

Ricket v. *Metropolitan Railway Company* (3) distinguished.

The right of a landowner to use a public highway, *e.g.*, for the purpose of bringing materials for the building of a house on his land, must be exercised reasonably.

If there are several ways of access to the land there is no absolute right to use the most convenient way exclusively, without regard to the convenience of neighbouring landowners.

Where damages are claimed in substitution for an injunction to restrain a wrongful act commenced before the issue of the writ and continued afterwards, if the wrongful act has come to an end before the trial the Court has jurisdiction, under sect. 3 of *Lord Cairns' Act*, to assess the whole of the damages accrued.

Davenport v. *Rylands* (4) followed.

Lord Cairns' Act remains in force notwithstanding the passing of the Judicature Acts.

A motion for an interim injunction was adjourned to the trial of the action. No provision was made for the costs of the motion, and liberty to apply was not expressly reserved. At the trial judgment was given for the Plaintiff on the substantial question at issue, with the general costs of the action, less £10 for the costs of an issue upon which he had substantially failed. The Plaintiff's counsel omitted to ask for the costs of the adjourned motion, and no express provision was made for them. Liberty to apply to the Court was expressly reserved. The judgment having been drawn up, passed, and entered, the Taxing Master refused to allow the Plaintiff the costs of the adjourned motion. The Plaintiff then applied to the Court by

(1) 5 Man. & G. 613.
(2) 1 App. Cas. 662.
(3) Law Rep. 2 H. L. 175.
(4) Ibid. 1 Eq. 302.

motion, asking that the judgment might be varied or corrected by giving him the costs of the adjourned motion:—

Held, that either under the liberty to apply reserved by the judgment, or under the liberty to apply implied in the order adjourning the motion, or by virtue of Order 41a, the Court had jurisdiction to order the payment of the costs in question. And a separate order was made, directing the taxation and payment of the Plaintiff's costs of the motion.

In every order of the Court liberty to apply to the Court is implied, without its being expressly reserved.

THIS action was brought to restrain an alleged nuisance committed by the Defendant, and for damages.

The Plaintiff was the occupier of a house and shop situate on the east side of *Fetter Lane*, in the city of *London*, where he carried on business as a dealer in pictures, old china, and other curiosities, and also as a tailor. The house was situate on the north side of, and was bounded on its south side by, a narrow passage, which led in an easterly direction out of *Fetter Lane* into a narrow court, called *Fleur-de-Lis Court*, which ran in a direction approximately parallel to *Fetter Lane*. This Court was also approached by another narrow passage (which was known as part of *Fleur-de-Lis Court*), leading eastwards out of *Fetter Lane*, but situate south of, and nearer to *Fleet Street* than, the passage which led by the Plaintiff's house (which will for the sake of distinction be henceforth called "the Plaintiff's passage"). Both the passages, as well as *Fleur-de-Lis Court*, were public thoroughfares. The north end of *Fleur-de-Lis Court* communicated with another passage, called *Trinity Church Passage*, which was situate to the north of the Plaintiff's house, and ran eastwards out of *Fetter Lane*. The east end of the Plaintiff's house was bounded by *Fleur-de-Lis Court*. The Plaintiff's shop had a window looking on *Fetter Lane*, and another window looking on the Plaintiff's passage, and the entrance door of the shop, as well as the private door of the house, opened on the Plaintiff's passage.

On the east side of *Fleur-de-Lis Court*, and nearly opposite the east end of the Plaintiff's house, were some premises belonging to a society, called the *Scottish Corporation*. Access could be obtained to these premises from *Fetter Lane* by means of any of the three passages which led from it into *Fleur-de-Lis Court*, that is, *Trinity Church Passage*, the Plaintiff's passage,

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and the passage forming part of *Fleur-de-Lis Court*, further to the south. The only other mode of access to the premises was through a narrow court, called *Crane Court*, which led direct from the north side of *Fleet Street* to the south side of the premises. The distance of the premises from *Fleet Street* by *Crane Court* was eighty-four yards; the distance from *Fetter Lane* by the Plaintiff's passage was about fifty feet. No cart or waggon could approach close to the premises, all the passages by which access could be obtained being only footways. The nearest point to which carts or waggons could approach was the *Fetter Lane* end of the Plaintiff's passage. The entrance to *Fleur-de-Lis Court* from *Trinity Church Passage* was too narrow to be used for the carrying of building materials.

The Defendant was a builder, who, in the year 1879, entered into a contract for £6000 with the *Scottish Corporation* for the rebuilding of a new hall on their premises in place of an old hall which had been then recently destroyed by fire. The Defendant's operations were commenced on the 21st of May, 1879, and were continued for some months. The operations consisted of pulling down what remained of the old hall, removing the old materials, excavating the foundations of the new hall, removing the earth excavated, carrying in the new materials, and the scaffolding and other implements employed in the erection of the new buildings, and removing those implements when the work was completed. The new materials included more than 200,000 bricks, a number of iron girders, and a quantity of stone, some of which was brought in large blocks, which were afterwards cut up in *Fleur-de-Lis Court*, sand and lime. The greater part of the old materials were carried out, and the greater part of the new materials were carried in, through the Plaintiff's passage.

The writ in the action was issued on the 7th of August, 1879, at which time the Defendant's building operations were still in progress. By his statement of claim, delivered on the 29th of October, 1879, the Plaintiff alleged various acts of trespass on the part of the Defendants, and various injuries and nuisances caused to him by the Defendant's acts. The main ground of the complaint was contained in the following allegations:—

"The Defendant in the course of his building operations at

various times has entirely prevented any access to, and during the whole thereof he has greatly and needlessly interfered with the means of access to, the Plaintiff's house, and in particular to the front part thereof, used by him as a shop. On numerous occasions the Defendant has blocked up the said passage" (*i.e.* the Plaintiff's passage) "so as to prevent any one, including the Plaintiff and his customers, from going into or out of the said passage, and on the same and on other occasions he has blocked up the doorways of the Plaintiff's house. He has also at improper times, particularly during the business hours of the day, and for an unreasonable length of time, blocked up the street, and occupied the pavement in front of the Plaintiff's house, by keeping his horses, carts, building materials, and workmen there standing."

The Plaintiff alleged that by these acts of the Defendant his customers, and other persons who would have become his customers, had been prevented from going to his shop and from looking into the windows thereof to observe the articles exposed for sale therein, and that his business had been greatly injured thereby, and his average takings seriously diminished.

The Plaintiff claimed an injunction, and damages.

By his statement of defence the Defendant denied the alleged wrongful acts, and denied that the Plaintiff had been injured by reason of any act done by him. And he alleged that he had a right to use the Plaintiff's passage in connection with his building operations in the manner in which he had used it.

The effect of the evidence is stated in the judgment of the Court.

North, Q.C., and *Seward Brice*, for the Plaintiff:—

An unreasonable obstruction of a public highway is an indictable offence: *Rex* v. *Cross* (1); *Rex* v. *Jones* (2); *Rex* v. *Russell* (3). In the last case the Court said (4) that anything which impeded the free passage of the public along a street without necessity was a nuisance.

[FRY, J.:—Those were all cases of permanent obstruction.]

In any case the use of the highway must be reasonable. In the

(1) 3 Camp. 224.
(2) Ibid. 230.
(3) 6 East, 427.
(4) Ibid. 430.

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present case the Defendant has acted unreasonably. The length during which the nuisance has lasted is only material with reference to the amount of damages which can be recovered: *Thorpe* v. *Brumfitt* (1). An individual can maintain an action when he has sustained particular and substantial damage from an act which is a public nuisance over and above the injury which is done to the public: *Benjamin* v. *Storr* (2).

[FRY, J., referred to *Rex* v. *Carlile* (3).]

The question is whether the Defendant's user of the highway has been reasonable. In a narrow passage like this the Defendant ought to have taken extra precautions to occasion as little inconvenience as possible to the Plaintiff: *St. Helen's Smelting Company* v. *Tipping* (4); *Bamford* v. *Turnley* (5).

[FRY, J., referred to *Attorney-General* v. *Sheffield Gas Consumers Company* (6).]

If the Defendant has not taken proper precautions to prevent injury he is liable: *Spokes* v. *Banbury Board of Health* (7).

[FRY, J., referred to *Mott* v. *Shoolbred* (8).]

Jones v. *Chappell* (9) is a similar case. The fact that the injury is at end does not deprive the Plaintiff of his right to damages: *Cory* v. *Thames Iron Works, &c., Company* (10). We claim £75 damages for loss of customers and £5 for loss of a lodger.

Cookson, Q.C., and *Northmore Lawrence*, for the Defendant:—

Damages cannot be recovered for a casual loss of custom occasioned by the temporary obstruction of a highway: *Ricket* v. *Metropolitan Railway Company* (11). Such damage is too remote, *Iveson* v. *Moore* (12); *Paine* v. *Partrich* (13); *Wilkes* v. *Hungerford Market Company* (14) has been overruled by *Ricket* v. *Metropolitan*

(1) Law Rep. 8 Ch. 650.
(2) Ibid. 9 C. P. 400.
(3) 6 Car. & P. 636.
(4) 4 B. & S. 608; 11 H. L. C. 642.
(5) 3 B. & S. 62.
(6) 3 D. M. & G. 604.
(7) Law Rep. 1 Eq. 42.
(8) Law Rep. 20 Eq. 22.
(9) Ibid. 539.
(10) 11 W. R. 589.
(11) 5 B. & S. 159; Law Rep. 2 H. L. 175.
(12) 1 Ld. Raym. 486; 12 Mod. 262.
(13) Carth. 191.
(14) 2 Bing. N. C. 281.

Railway Company. There the obstruction was created in the exercise of the statutory powers of a railway company, and the House of Lords held that the right of the Plaintiff to compensation under the *Lands Clauses Act* depended upon whether he could, if there had been no statutory powers to create the obstruction, have recovered damages for it. If the injury is a direct one to the Plaintiff, or to some one who stands in a legal relation to him, damages might be recovered, but not otherwise. The injury alleged here is that persons who might or might not have become customers of the Plaintiff may have been prevented by the Defendant's operations from passing by the Plaintiff's shop. Then there is a distinction between a temporary and a permanent obstruction of a highway. *Rex* v. *Cross* (1); *Rex* v. *Jones* (2); *Rex* v. *Russell* (3) were all cases of permanent obstruction; in the present case the obstruction was only temporary. *Thorpe* v. *Brumfitt* (4) depended on contract. *Benjamin* v. *Storr* (5) was also a case of permanent injury. The Defendant had an absolute right to use the shortest and most convenient mode of access to his works, which was through the Plaintiff's passage. But, in any event, the Plaintiff cannot recover damages for any injury which he has suffered since the issue of the writ, unless it is a direct consequence of some act which was done before the writ was issued. *Lord Cairns' Act* (21 & 22 Vict. c. 27), s. 2 (6), only conferred on the Court of Chancery in certain cases in addition to its own powers the power which the Courts of Common Law had of awarding damages. Damages cannot be awarded in respect of a new cause of action arising after the issue of the writ: *Davenport* v. *Rylands* (7); *Cory* v. *Thames Iron Works, &c., Com-*

(1) 3 Camp. 224.
(2) Ibid. 230.
(3) 6 East, 427.
(4) Law Rep. 8 Ch. 650.
(5) Ibid. 9 C. P. 400.
(6) Sect. 2: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct."
(7) Law Rep. 1 Eq. 302.

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pany (1); *Lamb* v. *Walker* (2); *Battishill* v. *Reed* (3); *Mayne* on Damages (4); *Kerr* on Injunctions (5).

[FRY, J., referred to *Pennington* v. *Brinsop Hall Coal Company* (6). If damages are to be given in substitution for an injunction, ought they not to extend to all that which would have been covered by the injunction? An injunction would have extended to future acts; ought not the damages to be given in respect of all those acts which the injunction would have prevented?]

That is an entirely new view of the effect of *Lord Cairns' Act*. It was not intended to enlarge the measure of damages, but only to give the Court of Chancery a new jurisdiction.

[FRY, J.:—There might be a difficulty in some cases in assessing damages in respect of future acts, but no such difficulty arises here, because the nuisance has come to an end before the trial.]

If the Court can give damages in respect of acts done after the issue of the writ, a defendant would not know what sum to pay into Court; and a case which was in its inception a trumpery one might be bolstered up by something done afterwards. In *Original Hartlepool Collieries Company* v. *Gibb* (7) the claim was very similar to that in the present case, and it was held that damages claimed by a counter-claim must be limited to the date when the writ was issued, and that on the ground that the plaintiff could not recover damages accrued after the issue of the writ. It has always been held under *Lord Cairns' Act* that damages cannot be recovered unless there would have been a right to an injunction. The injury in the present case was a merely temporary one; it was caused not by a continuous act, but by a succession of separate acts. In such a case an injunction would not be granted: *Attorney-General* v. *Sheffield Gas Consumers Company* (8). Therefore *Lord Cairns' Act* has no application. The Plaintiff has claimed too much; he has raised a number of untenable points, and he

(1) 11 W. R. 589.
(2) 3 Q. B. D. 389.
(3) 18 C. B. 696.
(4) 3rd Ed. pp. 84–90.
(5) 2nd Ed. pp. 40–44.
(6) 5 Ch. D. 769.
(7) Ibid. 713.
(8) 3 D. M. & G. 304.

ought at any rate to be deprived of the costs of the action: *Cracknall* v. *Janson* (1).

North, in reply:—

[FRY, J.:—Is there any authority on the question whether sect. 3 of *Lord Cairns' Act* remains in force since the passing of the Judicature Acts?]

White v. *Boby* (2) shews that it does.

[*Frank Evans*, *amicus curiæ*, referred to *Krehl* v. *Burrell* (3); *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (4); *Kino* v. *Rudkin* (5).]

An injunction would extend to an injury done after the issuing of the writ, and if damages are to be given in substitution for an injunction they should go to the same extent. It would be unreasonable and contrary to the intention of the Judicature Acts that the Plaintiff should have to commence a fresh action for the damages accrued since the issue of the writ in the present action. *Original Hartlepool Collieries Company* v. *Gibb* (6) was a different case. The plaintiff there only asked for damages down to the issue of the writ, and the question was whether the defendant could make a cross claim for damages down to a later date. It was held that he could not. *Lamb* v. *Walker* (7) shews that the tendency of the Court now is to give damages so as to compensate the plaintiff for the injury which he has sustained down to the trial: *Mayne* on Damages (8). Damages for loss of custom are not too remote.

[FRY, J.:—The only question is whether they are too remote when the action is founded on a public nuisance.]

In *Rose* v. *Groves* (9) damages were given in respect of loss of custom resulting from an obstruction to the access of a public-house from a navigable river. An individual can recover damages for the particular injury which results to him from a public

(1) 11 Ch. D. 1, 23.
(2) 26 W. R. 133.
(3) 7 Ch. D. 551; 11 Ch. D. 146.
(4) 6 Ch. D. 757.
(5) 6 Ch. D. 160.
(6) 5 Ch. D. 713.
(7) 3 Q. B. D. 389.
(8) 3rd Ed. p. 89.
(9) 5 Man. & G. 613.

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nuisance. In *Wilkes* v. *Hungerford Market Company* (1) the injury was general, not particular.

[FRY, J., referred to *Iveson* v. *Moore* (2).]

Rose v. *Groves* (3) was recognised and approved by the House of Lords in *Lyon* v. *Fishmongers' Company* (4), which case also shews that a landowner can recover damages for the particular wrong done to him by an obstruction of his access to a highway. Other authorities in our favour are: *Evans* v. *Harries* (5); *Riding* v. *Smith* (6); *Winterbottom* v. *Lord Derby* (7); *Benjamin* v. *Storr* (8); *Duke of Buccleuch* v. *Metropolitan Board of Works* (9); *Ripley* v. *Great Northern Railway Company* (10); *East and West India Docks Company* v. *Gattke* (11); *Beckett* v. *Midland Railway Company* (12); *Baker* v. *Moore*, cited in *Iveson* v. *Moore* (13); *Metropolitan Board of Works* v. *M'Carthy* (14). *Ricket* v. *Metropolitan Railway Company* (15) is distinguishable. The damage in that case was held to be too remote, on the ground that only casual customers had been interfered with. Our evidence shews that regular customers have been prevented from going to the Plaintiff's shop. Moreover, that case related to compensation under the *Lands Clauses Act*. *Rose* v. *Groves* is a distinct authority in our favour. *Theed* v. *Debenham* (16) is an illustration of the principles on which the Court acts in protecting property. No doubt some damage would have been inflicted on the Plaintiff if the Defendant had made only a reasonable use of the passage; but the *onus* is on the Defendant to shew that the whole of the damage has not resulted from the unreasonable use: *Nitro-Phosphate, &c., Company* v. *London and St. Katharine Docks Company* (17).

Cookson, in reply, as to *Rose* v. *Groves*:—

The judgment in that case was based on two grounds. One was

(1) 2 Bing. N. C. 281.
(2) 1 Ld. Raym. 486; 12 Mod. 262; Com. Digest, 5th Ed. vol. i. p. 278.
(3) 5 Man. & G. 613.
(4) 1 App. Cas. 662.
(5) 1 H. & N. 251.
(6) 1 Ex. D. 91.
(7) Law Rep. 2 Ex. 316.
(8) Ibid. 9 C. P. 400.
(9) Law Rep. 5 H. L. 418.
(10) Ibid. 10 Ch. 435.
(11) 3 Mac. & G. 155.
(12) Law Rep. 3 C. P. 82.
(13) 1 Ld. Raym. 486, 491.
(14) Law Rep. 7 H. L. 243.
(15) Ibid. 2 H. L. 175.
(16) 2 Ch. D. 165.
(17) 9 Ch. D. 503.

the authority of *Wilkes* v. *Hungerford Market Company* (1), which is now overruled. The other was the right of a riparian proprietor to access to a stream which flows past his property, and it was this ground which was recognised in *Lyon* v. *Fishmongers' Company* (2), and there it was recognised only so far as it was not traversed. There is no similar right in the owner of property abutting on a highway. *Ricket* v. *Metropolitan Railway Company* (3) was not overruled by *Lyon* v. *Fishmongers' Company*, and it is a clear authority that damages are not recoverable for a mere loss of casual customers resulting from the stopping up of a highway.

FRY, J., after stating the nature of the relief claimed, and observing that the trespasses proved, as distinguished from the nuisance, were of the most trifling description, and that he could only award the Plaintiff one farthing damages in respect of them, continued:—

The serious part of the case arises out of the allegation of loss of custom to the Plaintiff in his character of a dealer in articles of antiquity, old china, and so forth, and of a tailor.

With regard to the business of a tailor there is no evidence of loss; the other business I shall consider presently.

The Plaintiff puts his case in two ways. He says, first, the Defendant has created a public nuisance, which has resulted in special or peculiar damage to me in consequence of the place where I reside and the place where the nuisance has been committed being so near to each other; and, secondly, I have a private right of entrance from the highway to my dwelling-house, and that private right the Defendant has interfered with.

Before I consider those rights separately, I must inquire whether the Defendant's user of the roadway of *Fetter Lane* and the Plaintiff's passage has been reasonable or unreasonable. The law with regard to the point appears to me to be easily gathered from one or two cases. In *Rex* v. *Jones* (4) Lord *Ellenborough* said: "So as to the repairing of a house—the public must submit to the inconvenience occasioned necessarily in repairing the house; but, if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted

(1) 2 Bing. N. C. 281.
(2) 1 App. Cas. 662.
(3) Law Rep. 2 H. L. 175.
(4) 3 Camp. 230.

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for a nuisance." Again, in *Benjamin* v. *Storr* (1), the question left by Mr. Justice *Honeyman* to the jury was (2) "whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience, telling them that they were not to consider solely what was convenient for the business of the defendants." The Defendant has asserted at the Bar an unqualified and absolute right to approach the area of the building operations which he was carrying on by the nearest road, to any extent, for any materials, for any time, and without regard to the Plaintiff's convenience or inconvenience. Such a claim is, in my judgment, untenable. It appears to me to be the expression of the selfish and not of the social man, of the man who recollects his rights but forgets his obligations, and human life could not be carried on if such extreme rights were asserted and insisted on. The question I have to decide is whether the user of the road or the roads in question by the Defendant was, having regard to all the circumstances of the case, reasonable. The circumstances are undoubtedly peculiar. The block of building which the Defendant had to erect could be approached from roads only by means of three passages—*Crane Court*, leading from *Fleet Street; Fleur-de-Lis Court*, leading from the southern part of *Fetter Lane;* and that which has been called for convenience the Plaintiff's passage, leading directly from the northern part of the site of the new buildings into *Fetter Lane*. That last passage was undoubtedly the most convenient mode of access for the Defendant to the site. It was the most convenient for several reasons. It was the shortest, and it also led to that portion of the site which the Defendant used as a yard for the purpose of his building operations. Moreover, the operations which the Defendant had to carry on were very considerable. The building contract was for nearly £6000. He had to remove a very large quantity of old building materials and rubbish, the removal of which occupied from the 21st of May to the 9th of July. He had to carry in a very large quantity of new materials, and the building operations lasted for several months. Under these circumstances, it appears to me that to carry on the whole of the Defendant's

(1) Law Rep. 9 C. P. 400. (2) Law Rep. 9 C. P. 402.

operations through the Plaintiff's passage was not reasonable. I am unable to see any reason why a large proportion of the old materials might not have been carried down *Crane Court*, or why a much larger proportion might not have been carried down *Fleur-de-Lis Court*, and the inconvenience necessarily created by carrying away rubbish of that character distributed over the whole of the passages which gave access to the site. Further than that, it appears to me that the Defendant, having regard to the peculiar difficulties of the case, should have made some different arrangement as to the time during which his operations were carried on. In fact he carried them on during the busiest hours of the day, and took no pains to diminish the inconvenience by carrying them on early in the morning or late at night.

What was the result to the Plaintiff of the operations thus carried on by the Defendant? Undoubtedly the passage by his house was for a long period of time practically devoted to the Defendant's building operations. For exactly how many days it was unsafe to cross that passage I do not know, but certainly for months those operations went on, and it appears to me that they went on in such a manner as to render it exceedingly difficult, if not impossible, for persons coming up from *Fleet Street* on the eastern side of *Fetter Lane*, to obtain access to the Plaintiff's premises, and the natural effect would be to drive away persons who might have become customers of the Plaintiff, and to render the access to his house so difficult that most persons would abandon passing along that side of the road. And there is some evidence that persons who were in the frequent habit of going to the Plaintiff's house as customers ceased to do so during a portion of the time in which these operations were going on.

What then has been the result of these operations to the Plaintiff? I have come to the conclusion that the Plaintiff has proved that he has sustained considerable loss in his business as a dealer in old curiosities in consequence of the Defendant's operations, and although it is very difficult to assess the amount of that loss, I have, sitting as a judge of fact, arrived at the conclusion that he has sustained loss to the extent of £60.

Then arises the question, does this state of circumstances gives rise to any legal right in the Plaintiff? The cases of

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Rose v. *Groves* (1) and *Lyon* v. *Fishmongers' Company* (2) appear to me to establish this, that where the private right of the owner of land of access to a highway is unlawfully interfered with, he may recover damages from the wrongdoer to the extent of his loss of profits in his business carried on at that place. The case of *Rose* v. *Groves* was a case of an owner of riparian property, and it is referred to by Lord Chancellor *Cairns* in *Lyon* v. *Fishmongers' Company*. Lord *Cairns* also cited (3) some observations of Lord *Hatherley*, when Vice-Chancellor, in *Attorney-General* v. *Conservators of the Thames* (4) to this effect: "I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway on the river. The existence of such a private right of access was recognised in *Rose* v. *Groves*. As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the Plaintiff, but on the principle that a private right of the Plaintiff had been interfered with. . . . Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway The public have no right to step on to the land of a private proprietor adjoining the road, and though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Applying that principle to the present case, it appears to me on the evidence that the access to the Plaintiff's door in the passage was interfered with by the acts of the Defendant, which I hold to have been unreasonable and therefore wrongful, and, that being so, the cases to which I have referred are authorities for the Plaintiff, and shew that he is entitled to recover the amount of loss which he has suffered in the business which he carries on upon his property.

But I will consider the case further on the ground of the private injury resulting from the public nuisance. The conditions under

(1) 5 Man. & G. 613.
(2) 1 App. Cas. 662.
(3) 1 App. Cas. 675.
(4) 1 H. & M. 1.

which a private person may recover in such a case as that are well expressed in the judgment of Lord Justice *Brett*, then a member of the Court of Common Pleas, in *Benjamin* v. *Storr* (1). He said: "The cases referred to upon this subject shew that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must shew a particular injury to himself beyond that which is suffered by the rest of the public." Now I ask whether in this case the Plaintiff has or has not sustained that particular injury from the public nuisance? It appears to me that he has.

The case of *Iveson* v. *Moore* (2) is one of great authority. It is reported in numerous books. It has found its way into the various digests of the law, and was cited with approval in *Ricket* v. *Metropolitan Railway Company* (3) by the Court of Exchequer Chamber, and the case itself was decided by the Court of Exchequer Chamber. Now, as cited in *Comyn's* Digest (4), that case resulted in this, "If *A.* has a colliery, and *B.* stops up a highway near it, whereby nothing can pass to his colliery, an action on the case lies; for he ought to be remedied in particular, though it was a highway for all." And accordingly, in *Benjamin* v. *Storr*, Lord Justice *Brett* considered that "if by reason of the access to his premises being obstructed for an unreasonable time, and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage." No doubt *Ricket* v. *Metropolitan Railway Company* (6) shews that where the obstruction is at a considerable distance and temporary, and the injury which the plaintiff sustains is only in common with a large number of other persons, such a right of action does not arise. But it appears to me that the present case is far more like *Iveson* v. *Moore* and *Benjamin* v. *Storr* than either *Wilkes* v. *Hungerford Market Company* (7) or *Ricket* v. *Metropolitan Railway Company*, and that there is here that parti-

(1) Law Rep. 9 C. P. 406.
(2) 1 Ld. Raym. 486; 12 Mod. 262.
(3) 5 B. & S. 156.
(4) 5th Ed. vol. i. p. 278.
(5) Law Rep. 9 C. P. 400, 407.
(6) Ibid. 2 H. L. 175.
(7) 2 Bing. N. C. 281.

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cular injury to the Plaintiff resulting from a public nuisance which is referred to in the cases.

The second condition which is referred to by the Lord Justice *Brett* in *Benjamin* v. *Storr* (1) is this: "Other cases," he says, "shew that the injury to the individual must be direct, and not a mere consequential injury." Now, I have already considered that point, and the cases to which I have referred seem to shew that the injury in this case is sufficiently direct. Lastly, the Lord Justice says: "The injury must be shewn to be of a substantial character, not fleeting or evanescent." What is the meaning of those words, "fleeting or evanescent"? It is not, perhaps, easy to answer the question, but it appears to me that nothing can be deemed to be fleeting or evanescent which results in substantial damage, and that the question, therefore, is to be answered not by time, but by the effects upon the plaintiff; and accordingly in *Iveson* v. *Moore* (2), which, as it appears to me, I am bound to treat as law, I find that the interruption of a highway for a month was deemed a sufficient interference to give the plaintiff a right of action. The result, therefore, to my mind is this, that, even upon the ground of public nuisance, the Plaintiff has made out his case, and it follows from what I have already said that he is entitled to judgment for damages to the extent of £60.

But then this argument was raised for the Defendant. It was said that the £60 represents in part damages accrued to the Plaintiff after the issue of the writ, and that the only thing which the Court can now assess is the amount of damage sustained anterior to the issue of the writ, and that consequently the whole amount cannot now be recovered. Nothing that I am about to say will affect the general question whether the damages sought for by a writ or by a counter-claim go beyond the date of the writ or counter-claim. What I have to consider is the power and duty of the Court in a case in which, there being jurisdiction to grant an injunction, the Court, under *Lord Cairns' Act*, gives damages in substitution for an injunction. As we all know, the Court has power under that Act, if it thinks fit, to grant damages in substitution for or in addition to an injunction, and I am now asked to give damages in substitution for an injunction. Now it is manifest

(1) Law Rep. 9 C. P. 407. (2) 1 Ld. Raym. 486; 12 Mod. 262.

that damages cannot be an adequate substitute for an injunction unless they cover the whole area which would have been covered by the injunction, and that is often one difficulty in giving damages in lieu of an injunction. But here the circumstances are peculiar. The damages sought for are partly those which accrued before the issue of the writ, and partly those which accrued after; but they all accrued before the trial, because the cause of the annoyance had come to an end before the trial. Ought I, under these circumstances, to refuse to give the entire damages, covering the whole ground which the injunction might have covered, or ought I to leave the Plaintiff to bring a second action for the damages which accrued between the issue of the writ and the conclusion of the Defendant's operations? It is manifest that the latter course would be highly inconvenient, and it seems to me that it would be at variance with the intention of the Act, which was clearly meant to prevent the multiplicity of actions and the excess of costs. I think, however, that the question is covered by authority, and by an authority which was cited to me by the Defendant's counsel. In *Davenport* v. *Rylands* (1), before Lord *Hatherley* (then Vice-Chancellor), an injunction had been sought for in respect of the infringement of a patent. Before the case was heard the patent had expired, and the Court was then asked to assess damages in lieu of the injunction. The first question raised was whether, the patent being gone, the injunction could be granted, and whether, if it could not be granted, there was jurisdiction to give damages. The Vice-Chancellor held that he had jurisdiction to give damages. The next question, of course, was what damages should be assessed, and the Vice-Chancellor directed an inquiry what damages the plaintiff had sustained, and he added (2): "The inquiry must extend to the sale by the Defendants of any articles manufactured by them within six years before the filing of the bill, and up to the expiry of the patent, by that process the exclusive use of which was secured by the letters patent in the bill mentioned." He, therefore, did not stop the assessment of the damages at the filing of the bill, but continued it until the determination of the wrong. I shall gladly follow that precedent, and direct that the whole sum which I have men-

(1) Law Rep. 1 Eq. 302. (2) Law Rep. 1 Eq. 308.

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tioned, and which, as I have said, includes the damages sustained subsequent to the issue of the writ, be paid by the Defendant to the Plaintiff.

It follows that the general costs of the action must be borne by the Defendant. But, seeing that a portion of the Plaintiff's claim was addressed to the trifling acts of trespass which I have mentioned, I shall disallow £10 of the costs.

May 31. A motion was now made on behalf of the Plaintiff for an order that the judgment at the trial, which had been drawn up, passed, and entered, might be varied or corrected by giving the Plaintiff the costs of and occasioned by a motion for an injunction before the Vacation Judge on the 24th of September and the 1st and 8th of October, 1879, and before the Master of the Rolls on the 7th and 14th of November, 1879, and which was adjourned to the hearing, including the evidence used upon such motion.

The order made by the Master of the Rolls on the 14th of November, 1879, adjourning the motion to the trial of the action, did not make any provision for the costs of the motion, nor did it in terms reserve liberty to the parties to apply to the Court. This order was never drawn up.

The judgment at the trial on the 4th of March, 1880, as drawn up by the Registrar was as follows: "This Court doth order and adjudge that the Defendant do pay to the Plaintiff the sum of £60 for damages which he has sustained in his business as a dealer in old curiosities in consequence of the Defendant's operations, and one farthing in respect of the trespasses committed by the Defendant upon the premises of the Plaintiff. And it is ordered that the Defendant do pay to the Plaintiff his costs of this action, less the sum of £10, such costs to be taxed by the Taxing Master. And either of the parties is to be at liberty to apply as there may be occasion." At the trial the Plaintiff's counsel omitted to ask for the costs of the motion. The Plaintiff contended on the taxation of the costs that he was entitled to the costs of the motion as part of the general costs of the action, but the Taxing Master refused to allow them. Notice of the present motion was then, by leave of the Court, given.

Before serving notice of the motion the Plaintiff applied to the

Defendant to consent to the allowance of the costs, but the Defendant refused to do so.

North, Q.C., and *Seward Brice*, for the motion.

Cookson, Q.C., and *Northmore Lawrence*, for the Defendant, took the preliminary objection that the application was in effect for a rehearing of the action. The Court has no jurisdiction to rehear: *In re St. Nazaire Company* (1).

North, Q.C., and *Seward Brice*, for the Plaintiff:—

We do not ask for a rehearing. Under the old practice the Court of Chancery granted applications similar to the present one after the decree had been inrolled: *Viney* v. *Chaplin* (2); *Mounsey* v. *Earl of Londsdale* (3). The Court can do what is asked under the liberty to apply reserved by the judgment. At any rate, the Court has power to order what we ask under the Order 41A of December, 1879 (4).

It was owing to an accidental slip or omission of the Plaintiff's counsel to ask for these costs that they were not expressly given by the judgment. The motion was in effect a successful motion. The Court can now either correct the judgment, or it can make a new substantive order, as was done in *Viney* v. *Chaplin*. Probably, the latter would be the better course.

Cookson, Q.C., and *Northmore Lawrence*, for the Defendant:—

There are no merits in the application. In *Mounsey* v. *Earl of Lonsdale* the injunction which had been asked by the motion was made perpetual at the hearing, and the affidavits used on the motion had been entered in the decree. In the present case no injunction was granted at the trial, and as to damages the Plaintiff succeeded in only one of his claims. And the affidavits made on the motion have not been entered in the judgment, though the Registrar was asked to enter them. It cannot be said that the motion was successful, and therefore no costs of it ought to be given to the Plaintiff.

(1) 12 Ch. D. 88.
(2) 3 De G. & J. 282.
(3) Law Rep. 10 Eq. 557; Ibid. 6 Ch. 141.
(4) Order 41A: "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion without an appeal."

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[FRY, J.:—I gave damages in substitution for an injunction.]

They were not given in substitution for an interim injunction. The Plaintiff delayed too long in moving for an interim injunction. The Defendant's works were commenced on the 21st of May; the motion was not made until the 24th of September. The Court is not entitled to look at the evidence on the trial for the purpose of determining whether the motion for an interim injunction was properly made.

[FRY, J.:—I am entitled to see whether the facts were such as the Defendant swore that they were in his affidavit upon the interlocutory motion.]

In *Viney* v. *Chaplin* (1) the only question was how the costs should be given; the Court was clearly of opinion that they ought to be given somehow. Moreover, the order on the motion in that case had expressly reserved liberty to apply. In the present case liberty to apply is only reserved in the judgment at the trial. Liberty to apply does not include an application to vary the order; it only authorizes applications to enforce it.

Order 41A does not apply. This is not an accidental slip or omission. Those words mean only an accidental slip or omission to embody in the order something which the Court in fact ordered to be done; they do not apply to an accidental omission of counsel or solicitor to ask for, or of the Court to provide for, something which ought to have been provided for.

The present application is wrong in form. It should have been a summons to review the taxation, and to direct the Taxing Master to allow the Plaintiff the costs of the motion. That was the course pursued in *Mounsey* v. *Earl of Lonsdale* (2).

FRY, J.:—

This is an application to give the Plaintiff the costs of a motion for an interim injunction made during the Long Vacation, and afterwards before the Master of the Rolls, when it was adjourned to the trial. The judgment which I pronounced at the trial has been drawn up, and passed and entered. In that state of circumstances the Defendant resists the application on three separate grounds. In the first place, he says that, in point of substance

(1) 3 De G. & J. 282. (2) Law Rep. 10 Eq. 557; Ibid. 6 Ch. 141.

and merits, the Plaintiff is not entitled to the costs. In my judgment the Plaintiff is entitled to the costs on that ground. I think that the motion was a proper one to make. The evidence on the trial shewed that the Plaintiff was justified in making it. The Defendant's evidence on the motion was inaccurate to a culpable extent, and contained statements which might well have induced the Judge to order the motion to stand over to the trial, or even to refuse it altogether. I heard the evidence which came out at the trial in opposition to the Defendant's affidavits used on the motion, and which were read to me; and from what the Defendant himself admitted, it appeared to me that the evidence on the motion on the part of the Defendant was strained in many important particulars. In the next place, it is said that I have no jurisdiction to amend the judgment or to grant this application, because the Court has no jurisdiction to rehear an action. In my opinion I have jurisdiction to grant this application. In the first place, it is to be borne in mind that an order was made, although it was not drawn up, directing the motion in question to stand until the trial. According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said), all orders of the Court carry with them *in gremio* liberty to apply to the Court. The judgment at the trial as drawn up reserves express liberty to apply. In *Viney* v. *Chaplin* (1) application was made under the liberty to apply reserved by the order that the motion should stand to the hearing of the cause, and it appears to me, therefore, that I am right in following *Viney* v. *Chaplin*, and that I can make the order which I am now about to make either under the liberty to apply reserved by implication in the order on the motion, or under the liberty expressly reserved by the judgment. Though actions are not originally set down before me, but are transferred to me for trial or hearing only, yet under rule 1a of Order LI. I have power to direct that any proceeding in the action, whether before or after the trial, shall be taken before me, and, if necessary, I should give a direction to that effect in regard to the present application.

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There is another ground on which, in my opinion, I have jurisdiction to make the order asked for, viz., under Order 41A. In my

(1) 3 De G. & J. 282.

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view the error in the present case has arisen from the accidental omission of counsel to call my attention to the adjourned motion when I pronounced my judgment, an omission very natural at a time when counsel's attention was directed to matters of greater importance. In substance the motion was before me at the trial, for my attention was called to the affidavits made upon it. I recollect quite enough of what took place, and I am confirmed in my recollection by the notes which I made at the time, to know that all the affidavits upon the motion were in substance before me at the trial, and that the various witnesses who made those affidavits were examined in the course of the proceedings. On this ground, therefore, I think I have jurisdiction to make the order.

In the third place, it is said that this application is wrong in form, that it ought to have been an application for a direction to the Taxing Master to allow the Plaintiff the costs of the motion.

It appears to me that the Plaintiff's right to the costs depends upon whether the motion is to be considered as successful or unsuccessful, and there is nothing in the judgment as drawn up to shew whether it was the one or the other. The Taxing Master might very fairly say that, if the Court had intended to give the Plaintiff the costs of the motion, there would have been a direction to that effect in the judgment.

I think, therefore, that the application has been made in the proper way, and I shall make a separate order (following the precedent in *Viney* v. *Chaplin* (1)) directing the taxation of the Plaintiff's costs of the motion, and their payment by the Defendant. And as, before making the present motion, the Plaintiff applied to the Defendant to consent to the payment of the costs of the adjourned motion, I shall give the Plaintiff also the costs of the present motion.

Solicitors for Plaintiff: *Moresby-White & Co.*
Solicitor for Defendant: *W. M. Webster.*

(1) 3 De G. & J. 282.

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[1879 G. 84.]

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Feb. 2.
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May 1, 3.

Registration of Annuities—Incumbrancer with Notice—18 & 19 *Vict.* c. 15, s. 12.

A landowner, by deed in February, 1872, charged his land with two life annuities. He subsequently made several mortgages of the property by deeds, some of which recited the annuity deed. The annuity deed had not been registered as required by 18 & 19 Vict. c. 15, s. 12:—

Held, by the Master of the Rolls, that the annuity deed not being registered, was void as against all the subsequent incumbrancers, whether they had notice of it or not:

Held, by the Court of Appeal, that as the 18 & 19 Vict. c. 15, s. 12, was in similar terms to the clauses in the Registry Acts, which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice of it, the Legislature must be taken to have used the words in the later Act in the sense given to them by those decisions, and that the annuities therefore were valid as against all the subsequent incumbrancers who took with notice of them, and against the trustee in bankruptcy of the grantor.

BY an indenture, dated the 8th of February, 1872, made between *John Brook Greaves*, the son, of the first part, *John Brook Greaves*, the father, and the Plaintiff *Sarah Brook Greaves*, his wife, of the second part, and the Plaintiff *Charlotte Brook Greaves*, who was then the wife of *Richard Brook Greaves*, the elder brother of *John Brook Greaves*, the son, of the third part, *John Brook Greaves*, the son, in consideration of a covenant by the father thereinafter contained, charged all the estate and interest to which he should become entitled by purchase as the person answering the description of heir-at-law of *J. B. Greaves*, the father, in the estates devised by the will of *Richard Brook*, with the payment to *Sarah B. Greaves* during widowhood of an annuity of £200, and with the payment to *Charlotte Brook Greaves* during her widowhood of an annuity of £500. The father covenanted not to appeal against the decree in *Greaves* v. *Simpson* (1), which declared the construction of the will, and not to revoke or lessen a provision which he had made by will in favour of *J. B. Greaves* the son.

John Brook Greaves the son was a solicitor, and acted for all

(1) 12 W. R. 773.

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parties in the preparation, completion, and execution of the above deed. The bulk of the property was situate in the *West Riding of Yorkshire*, but some part of it was in the *East Riding*. *J. B. Greaves* the son caused a memorial of the deed to be registered in the *West Riding*, but not in the *East Riding*, and did not cause a memorandum of it to be left with the Senior Master of the Common Pleas pursuant to 18 & 19 Vict. c. 15, s. 12.

Richard Brook Greaves died without issue on the 17th of April, 1876, and *John Brook Greaves* became heir apparent of his father.

On the 20th of June, 1877, *J. B. Greaves* the son mortgaged part of the estates to the Defendants *Hey* and *Weddell* by a deed which recited the annuity deed, and on the 1st of March, 1878, and 19th of June, 1878, he executed other mortgages, also reciting the annuity deed.

J. B. Greaves the father died on the 29th of June, 1878, upon which *J. B. Greaves* the son, as the person answering the description of his heir-at-law, became entitled in fee simple in possession.

J. B. Greaves the son executed several other mortgages of the property to different mortgagees, some of whom admitted and some denied notice of the annuity deed. On the 23rd of December, 1878, he was adjudicated a bankrupt.

This action was brought by the annuitants, *Sarah Brook Greaves* and *Charlotte Brook Greaves*, against the trustees of the will, the incumbrancers, and the trustees in bankruptcy, to have it declared that the annuities were payable in priority to the incumbrances, and to obtain payment of the arrears and future instalments.

Ince, Q.C., and *G. Curtis Price*, for the Plaintiffs, contended that, at all events, the incumbrancers who took with notice of the annuity deed must rank subsequently to it, notwithstanding that it was not registered. They referred to 18 & 19 Vict. c. 15 (*Judgment Registration Act*); 5 Anne, c. 18 (*Yorkshire Registry Act*); 7 Anne, c. 20 (*Middlesex Registry Act*); *Le Neve* v. *Le Neve* (1); *Tunstall* v. *Trappes* (2); and *Davis* v. *Earl of Strathmore* (3).

Chitty, Q.C., *Ingle Joyce*, *J. J. Hamilton Humphreys*, *Vernon R. Smith*, and *E. Martin*, for the Defendants, were not called upon.

(1) Amb. 436; 2 W. & T. L. C. 5th Ed. p. 32. (2) 3 Sim. 300.
(3) 16 Ves. 419.

JESSEL, M.R.:—

The policy of the Legislature appears to me to be so clearly expressed that I should, in my opinion, be repealing the Act of Parliament in question (18 & 19 Vict. c. 15), were I to decide this case in favour of the Plaintiffs. First of all I will look at the Act as it stands, and then consider how far it is affected by authority. Now, as to the Act itself, I agree it would have been better if the draughtsman had inserted in the 12th section the words "any notice notwithstanding," as he has in some of the prior sections: had he done so there would have been nothing to argue.

The policy of these Acts is very plainly expressed in the Acts themselves. The object was to enable a purchaser of land to ascertain, by a single search, what incumbrances there were on the land, and if the register searched did not disclose any he was not to trouble himself any more. And there was a good reason for that policy, because the doctrine of constructive notice had been carried to such an extent that it had actually become dangerous to employ in a purchase a solicitor of good practice and reputation; for although it had been held that notice to a solicitor of one client in one transaction was not necessarily constructive notice to another client of his in a subsequent transaction, yet it had also been held that if the one transaction occurred so close to the other that the solicitor must be presumed not to have forgotten it, there was constructive notice of it. The result was that the more business a solicitor had to do, and therefore the greater the probability that he would discharge from his mind even recent occurrences relating to affairs of another client, the more likely it was that the next client would be fixed with notice on the ground that the transaction in question had occurred very recently after the other one in which the solicitor had been employed.

Now to find out the policy of the Act you cannot do better than look at what it enacted as regards judgments and other things. Of course, an Act of Parliament cannot have two policies; the public policy pervading the Act must be the same throughout.

The Act begins by stopping certain local judgments as against land, and then it goes on to say in the 4th section: "And whereas the protection afforded to purchasers, mortgagees and creditors, by

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the said Act of the third and fourth of Her Majesty, against judgments, decrees, orders or rules not duly registered, any notice thereof notwithstanding, is confined to judgments, decrees, orders or rules binding by virtue of the said Act of the first and second years of Her Majesty: And whereas the docket or register previously in use has been closed and the said provision ought not to be so restricted." Then the section goes on to extend that provision by enacting "that no judgment, decree, order or rule which might be registered under the said Act of the first and second years of Her Majesty shall affect any lands, tenements or hereditaments, at Law or in Equity, as to purchasers, mortgagees or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the proper officer of the proper Court, any notice of any such judgment, decree, order or rule to any such purchaser, mortgagee or creditor in any wise notwithstanding." That is, the Act destroyed the validity of then existing charges on real estates, unless they had been registered or were immediately afterwards registered. So much for the policy of the Act irrespective of notice.

Then the 5th section, after saying that "it is expedient that certain doubts which have arisen upon some of the provisions for the protection of purchasers against judgments in the said Acts contained should be removed," declares that those provisions shall extend as explained by this Act, "so that notice of any judgment, decree, order or rule, not duly registered, shall not avail against purchasers, mortgagees or creditors as to lands, tenements or hereditaments." That is a most express enactment confined in terms to the question of notice: any notice expressed or implied, is altogether immaterial.

Then there is a provision in the 10th section extending protection in the case of unregistered bankruptcy orders: that section says "Any notice to any such purchaser, mortgagee or creditor in any wise notwithstanding." There again, the notice is immaterial.

Then we come to the 12th section, on which the question turns, and in which those words are not to be found: they ought to have been put in: "And whereas by reason of the repeal in the last session of Parliament of the Act of the 53rd year of King *George* the Third, chapter 141, requiring the enrolment of life

annuities or rent-charges, purchasers are no longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: be it therefore enacted . . . . as follows: any annuity or rent-charge granted after the passing of this Act . . . . shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name . . . . shall be left" with the proper officer.

Now what is the meaning of that? Until the then last session of Parliament an unenrolled annuity was absolutely void whether you had express notice of it or not. That had been decided on the words of the statute of *George* III., which made it void to all intents and purposes; and consequently the new Act, if it is to be considered as having the effect now contended for on the part of the Plaintiffs, would give a validity to annuities which they did not possess up to the then last session of Parliament. That is not to be forgotten. The section says that it is by reason of the repeal of the former Act that "purchasers are no longer enabled to ascertain by search"—that is, by search only; notice is immaterial; and the new Act intends to remedy that. It then says, "Be it therefore enacted," and so on—that is, it is intended to restore purchasers to the same position as they occupied before the repeal of the former Act, so that they can ascertain by search without troubling themselves about constructive notice or even actual notice; and this makes the whole thing consistent. The object of the Act is the protection of the purchaser, or mortgagee, or creditor. The Legislature says, in effect, "he has lost some protection by the repeal in the last session, and we will restore it," that is the plain object and meaning of the section; in other words, he is to be substantially in the same position as regards a search under the new register as he was under the old register. Then it is said, notwithstanding all that, the draughtsman has used words somewhat similar to those found in the *Middlesex* and *Yorkshire* Registry Acts; and that it has been decided under those Acts that notice, even constructive notice, will do, and that the same rule ought to be applied to the construction of this Act of Parliament.

In order to ascertain whether those decisions are binding, so as

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to prevent my giving effect to what I consider is the plain meaning of the present Act of Parliament, we must look at the ground or the principle of the decisions, because I agree, if the Legislature has, *in pari materiâ*, passed an Act in the same words, and a construction has been put by the Courts of Justice on those particular words, the Court, in construing the section, must have regard to those decisions. Now, when we come to look at those decisions, I think they do not affect the present question. The leading case on the subject is *Le Neve* v. *Le Neve* (1), which was a case of constructive notice—notice to a solicitor. There Lord *Hardwicke* came to the conclusion that the Act of Parliament in question, the *Middlesex Registry Act* (7 Anne, c. 20), did not intend to protect a purchaser who had any notice at all. But why? Because he says the object of that Act was only to prevent a man being injured by prior and secret conveyances. Lord *Hardwicke* begins by reading the Act, and first reads the preamble:—"Whereas, by the different and secret ways of conveying lands," &c., "such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, by prior and secret conveyances and fraudulent encumbrances." There is nothing of the kind in the present Act of Parliament. Under this Act it is clear the purchaser is very often to be protected with the most express notice; and I cannot see any reason to doubt that the policy of the Act would be the same as regards an annuity as it is with regard to a judgment or decree: I see no reason why there should be a different policy.

Then Lord *Hardwicke* goes on to read the enacting part, which winds up in this way: "and that every such deed or conveyance that shall, at any time after, &c., be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." Then Lord *Hardwicke* asks, "What appears, by the preamble, to be the intention of the Act? Plainly, to secure subsequent purchasers and mortgagees against

(1) Amb. 436, 441; 2 W. & T. L. C. 5th Ed. p. 32.

prior secret conveyances and fraudulent incumbrances. Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced." So that Lord *Hardwicke* reads the words of the preamble and of the enacting part together. "The enacting clause says that every such deed shall be void against any subsequent purchaser or mortgagee, unless the memorial thereof be registered, &c.; that is, it gives him the legal estate, but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger when he knows of another incumbrance, because he might then have stopped his hand from proceeding." He therefore states that where there is notice of the prior unregistered deed, the effect of the statute is to make the unregistered deed void at law; but it does not make it void in equity, because that is not the intention or policy of the statute. But that decision does not apply to the statute before me, the policy of which is entirely different to that of the *Middlesex Registry Act*, the question of notice or no notice being, as I have said, immaterial.

That being so, it appears to me that the decision in *Le Neve* v. *Le Neve* (1), and the numerous cases which follow it, have no application to the present case, and that the annuity deed is invalid as against all the incumbrances; it being, in my opinion, quite immaterial whether the incumbrancers had or had not notice of the deed.

C. A.

The Plaintiffs appealed from this decision. The appeal came on for hearing on the 1st of May.

Ince, Q.C., and *G. Curtis Price*, for the Appellants:—

The variation of wording in the different clauses of 18 & 19 Vict. c. 15, is important. In sects. 4, 5, 10, where the Legislature intended to exclude the effect of notice, it said so. In sect. 12, on which the present case turns, nothing is said as to notice. In *Tunstall* v. *Trappes* (2), under the *West Riding Registry Act*, 5 & 6 Anne, c. 18, s. 4, the words of which were almost the same

(1) Amb. 436, 441; 2 W. & T. L. C. 5th Ed. p. 32. (2) 3 Sim. 301.

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as in this clause, notice was held to exclude their operation according to the principle of *Le Neve* v. *Le Neve* (1). The Act in substance says that there is to be a registry in order that purchasers may have notice.

[BRAMWELL, L.J.:—And that they may not be troubled with questions whether they had notice or not.]

The Act was passed with the knowledge of the decision on similar words in *Tunstall* v. *Trappes* (2) and other cases, and must be held to have proceeded on that footing. In *Davis* v. *Earl of Strathmore* (3), Lord *Eldon* pointed out the difference between the Registry Acts and the old Annuity Acts, which declared an instrument not complying with the enactment to be void to all intents and purposes. The Master of the Rolls has construed the present enactment by reference to the old Annuity Acts. But that is fallacious. The object of the present enactment is to protect purchasers, the object of the old Acts was to protect the borrower: *Ferguson* v. *Lomax* (4). The words of the provision that the annuity deed if not registered shall not affect any land as against purchasers, mortgagees, or creditors, must be taken with some qualifications. "Creditors" must mean creditors who have some lien on the land, and cannot include creditors under a bankruptcy, for a trustee in bankruptcy takes only what belongs to the debtor: *Ex parte Holthausen* (5). We say then that our annuities are good as against the trustee in bankruptcy, and all the incumbrancers who took with notice of them.

[*Ex parte Wright* (6) was also referred to.]

Chitty, Q.C., and *Vernon R. Smith*, *contrà*:—

The provisions of the Act are to a great extent made inoperative if notice is introduced as an element. A judgment creditor had no claim upon land as against prior equitable claimants, *Whitworth* v. *Gaugain* (7), so that apart from the Act a judgment creditor would take subject to a prior annuity whether he had notice of it or not. It is therefore, as regards judgment

(1) 1 Ves. Sen. 64; 3 Atk. 646; Amb. 436.
(2) 3 Sim. 301.
(3) 16 Ves. 419, 427.
(4) 2 D. & War. 120, 129.
(5) Law Rep. 9 Ch. 722, 726.
(6) 19 Ves. 255.
(7) 1 Ph. 728.

creditors, impossible to give the Act any operation at all unless its words are taken in their natural sense, which is that the unregistered annuity shall not affect the land at all. This shews the meaning of the Legislature to have been to exclude the doctrine of notice.

[BRAMWELL, L.J.:—The statute does not say that the conscience of the holder of the land shall not be affected.]

The policy of the Act is shewn by the provision, sects. 4, 5, 10, that in the cases there mentioned notice shall make no difference.

Ingle Joyce, *J. J. Hamilton Humphreys*, and *E. Martin*, for other parties.

JAMES, L.J.:—

I am of opinion that this decision of the Master of the Rolls ought not to be sustained. The 12th section of the Act 18 & 19 Vict. c. 15, is expressed in the very words of one of the old Registry Acts, which are in substance the same as those of the other Registry Acts, providing for the security of purchasers and mortgagees. Now, if an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the Legislature when using well-known words upon which there have been well-known decisions uses those words in the sense which the decisions have attached to them.

In the case of *Le Neve* v. *Le Neve* (1), which turned upon the *Middlesex Registry Act*, Lord *Hardwicke* came to the conclusion that the protection which was meant to be afforded was a protection against secret incumbrances, and that it never could have been the intention of the Legislature to put a man who had knowledge of a conveyance in the position of a man who was liable to be defrauded or injured by the existence of some secret dealings with the land. From that time, whatever expressions of doubt may have been used as to some of the language in the decisions, that has been the universal course of decision. In the case of *Davis* v. *Earl of Strathmore* (2), Lord *Eldon* expresses the principle

(1) 3 Atk. 646. (2) 16 Ves. 419.

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of the decisions in very clear language, to the effect that those statutes did not affect or take away the jurisdiction of Courts of Equity to enforce equitable rights depending upon contract, and in the case of contracts relating to land, as in all other contracts, Equity enforced them, not only as against the man who entered into them, but as against his heirs, and against volunteers under him, and as against persons who took his estate with notice of the contract, or trust, or obligation, with which he had bound his estate. Lord *Eldon* pointed out in that case that there was no altering the language of the Acts of Parliament, there was no dealing with or in any way repealing the Acts directly or indirectly, but giving the Acts their full force, that is to say, leaving the estate to go in priority to the man who had registered, still if that man had notice of anything by which his vendor or his grantor had bound himself, he was bound by it. I asked Mr. *Chitty* in the course of the argument, whether he could contend that in a register county an agreement for a purchase or an agreement for a lease, or a contract for an annuity, would be void as against a purchaser with notice of the contract. He was obliged to admit that it is every day's practice to enforce unregistered agreements relating to land even in register counties, and against purchasers who may have obtained conveyances which they have registered if they have notice of such prior contracts.

Now, that having been the course of decisions, why should any different construction be put on the 12th section of the 18 & 19 Vict. c. 15, which is in fact almost as much a distinct and separate enactment as if it had been a separate Act, and refers to a subject quite distinct from the other matters referred to in the Act, as to which very distinct considerations prevail?

It is said that the policy of this Act of Parliament, following a similar policy in other Acts of Parliament, was to relieve purchasers, mortgagees, and creditors, from the difficulties arising out of the equitable doctrine as to notice. If the Legislature meant or thought that the equitable doctrine as to notice had been carried too far, or had been used in a manner likely to create more mischief than it was doing good (as to which I may perhaps have a strong opinion myself) it was for the Legislature to express and to give effect to that view by altering the law as to notice,

and relieving persons still further than some of our recent decisions tend to relieve them from the mischief and inconvenience attending the doctrine of constructive notice. But I find no expression going to shew that the effect of notice is to be abolished as regards annuities any more than as regards other incumbrances. A purchaser, mortgagee, or creditor, is still liable to be affected by notice of any other incumbrance than an annuity, he is still liable to be affected by notice of any agreement for a lease, by notice of any contract affecting the use of the land, as, for instance, a covenant like that in *Tulk* v. *Moxhay* (1), and I see no reason to suppose that the Legislature, leaving the doctrine of notice still in existence as to all those classes of transactions and contracts, was making a distinct law and establishing a distinct policy with regard to life annuities and rent-charges.

It is said that you can gather such a policy from the Act itself, for that several prior sections all say that certain things shall not affect the land "any notice notwithstanding." Now, when you consider what the subjects are as to which those words are introduced, and contrast them with the particular subject of the 12th section, you find a plain reason why a distinction should be made and why those words should be left out. The subjects dealt with up to the 12th section are judgments, decrees, or orders of some Court by which a creditor or other person has obtained *in invitum* a right to execution against the debtor's property. With regard to those the Act of Parliament says that nobody shall be affected at Law or in Equity by any notice. It is for the judgment creditors who have obtained an order, to take care to complete their judgment or order by taking the final steps and registering it. If they do not, the debtor is to be at liberty to deal with his land just as he was at the moment when the writ was issued. That proceeds on the ground that the debtor's conscience is not affected by any obligation to retain the property that it may be laid hold of by the creditors. But when you come to the 12th section, where you are dealing with matters not of legal process but of contract, there you have exactly the same words which were used in the old Registry Acts upon which the construction to which I have referred had been put, and you have the significant, and what appears to

(1) 2 Ph. 774.

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me to be conclusive, expression of the opinion of the Legislature, by the omission of the words "in equity" and by the omission of the words "any notice to the contrary notwithstanding." It seems to me impossible to explain the omission from the 12th section of those words which had been repeated in several former sections, except on the ground that the Legislature considered them to have no proper application to the subject-matter of this section. I am of opinion that full effect can be given to every word in this section by saying that the grant of the annuity or rent-charge does not create any legal incumbrance upon the lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, but that the equitable right of any person who can affect the conscience of the purchaser or the owner of the lands remains the same as if this Act had not been passed. I am of opinion that a purchaser or mortgagee is not exempted by this section from his liability to equitable proceedings to enforce a prior equitable right arising out of a contract for valuable consideration of which he had notice, and I hold, therefore, that as against the mortgagees who had notice, the annuitant is entitled in equity to have his annuity paid in preference to them.

With regard to creditors there seems to be some difficulty in knowing what creditors are meant in this section, because the recital refers only to purchasers, which would include mortgagees. I take it that the word "creditors" must mean creditors who would, in some way or other, be affected, that is to say, creditors who would have some estate, or interest, or right, in or to the land. Those might be judgment creditors who, according to the former decisions, take nothing but what was legally and equitably the property of the judgment debtor, and it cannot have been intended to enlarge their right. The only other class of creditors who, as it seems to me, could come in would be general creditors represented by the trustee in bankruptcy, and the trustee in bankruptcy is a person who (except in peculiar cases provided for by the bankruptcy law) can only take that which the debtor himself had. It is utterly impossible, as it seems to me, to put the trustee in bankruptcy in any better position or on any higher footing than the debtor himself. I am of opinion, therefore, that the proper way to answer the question before us is that the annuitants are

entitled to equitable priority over any purchaser or mortgagee having notice of their annuities, and over the trustee in bankruptcy.

BAGGALLAY, L.J.:—

I am of the same opinion. It will, I think, be convenient in the first place to consider what the practice of Courts of Equity was under the Registry Acts. The earliest case to which we have been referred is *Le Neve* v. *Le Neve* (1), decided by Lord *Hardwicke* in 1747 upon the *Middlesex Registry Act*, and he put the case very shortly in this way, "The intent of the preamble of the Act was to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances, for the last of which there was no occasion to provide. The first means that a subsequent purchaser having registered should prevail against a prior secret conveyance of which he had no notice, but if he had notice of a prior conveyance for valuable consideration which was vested properly, that is not a secret conveyance. The Act does not say that a subsequent purchaser shall be affected with no equity whatever, therefore, though its manifest operation is to vest the legal estate according to the prior registry, yet it is left open to all equity." Then he refers to cases arising under the Act for the inrolment of bargains and sales, shewing that the rule had always been "that an inrolment by a subsequent bargainee having notice of a prior bargain for valuable consideration (whether by actual agreement to pass immediately or by articles) is not material, for he is equally affected with that notice as if his conveyance was by feoffment, or lease and release. So that the operation of Equity in both those Acts is the same, and is reasonable, for it were strange that a conveyance in such a form should exclude any equity, which would give an opportunity to take advantage of having the legal estate to commit fraud." He then proceeds to consider what prior cases under the Registry Acts there had been, and having referred to three or four decisions, turning on the *Registry Act of Ireland*, which was substantially the same as the *Middlesex Act*, he says: "The ground on which all the cases went was, that taking the legal estate after notice of a prior right for valuable

(1) 1 Ves. Sen. 64, 66.

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consideration was a fraud, and took away the *bona fides* of the second purchaser, making it *mala fides*." That was a recognised principle followed by Lord *Eldon* in the case of *Davis* v. *Earl of Strathmore* (1), and by other cases. In *Davis* v. *Earl of Strathmore*, the question turned on an undocketed judgment. At that time the *Annuity Act* in force was the 17 Geo. 3, c. 26, and Lord *Eldon* says there, "This Court, particularly in questions upon the *Annuity Act*, has acknowledged the distinction between Acts of Parliament denying legal effect to certain instruments and declaring them void to all intents and purposes, collecting from the more extensive words the inference that the equitable as well as the legal jurisdiction was intended to be prohibited." The Act of 17 Geo. 3, c. 26, was repealed by 53 Geo. 3, c. 141, and the repeal of the later Act in 1853 gave rise to the introduction into the Act of the 18 & 19 Vict. c. 15, of its 12th section.

This 12th section has its own preamble. "By reason of the repeal of the Act of 53 Geo. 3, c. 141, purchasers are no longer able to ascertain by search what life annuities may have been granted by their vendors or others." Then it says: "Be it therefore enacted," *i.e.*, for the remedy of that particular evil, and it proceeds to direct that a memorial shall be left with the senior Master of the Court of Common Pleas, and that if it be not so left the annuity shall not affect any lands, tenements, or hereditaments as to purchasers or creditors. I can see no reason why the principle which has been recognised for so many years in cases under the Registry Acts should not be applied to this section.

I should have been of that opinion if we had had merely to consider the effect of the 12th section alone. But we find that in other sections providing for the registering of certain judgments, decrees, and orders, there is an express provision that those judgments, decrees, or orders, shall not affect the lands and hereditaments, even if the subsequent purchaser, mortgagee, or creditor, shall have notice of any such judgment, decree, or order. In each of these sections we find an express provision excluding as regards those particular cases the exercise of that equitable jurisdiction which had been previously exercised. But when we come to sect. 12 we find no such exclusion of the doctrine, nor does it

(1) 16 Ves. 419, 428.

appear necessary, because the sole object being to enable persons to ascertain whether there has been any previous annuity deed, that object is gained without search if the party can obtain the information in any other way. For these reasons I am of opinion that the appeal should be allowed.

BRAMWELL, L.J. :—

I also think that this appeal must be allowed. I think so with great doubt and the greatest reluctance, but it seems to me that the authorities are conclusive. I understand them to have established this beyond dispute, that if a man having an estate agrees to sell it, or undertakes to grant an interest in it, or a charge upon it, for a valuable consideration, and afterwards, disregarding the bargain he has made, conveys to a third person, or so deals with it by bargain with a third person, that he is incompetent to convey the estate or grant the interest to the first which he had agreed to do, and the third person has all along had notice of the first contract, the conscience of the second purchaser is affected, and he cannot retain the estate without giving the person who entered into the first contract that right in it for which he had stipulated, and if necessary he must join in a conveyance of the estate if the first person was a purchaser, or he must join in executing a charge if it was a charge that was to be executed, or a lease if it was a lease to be granted.

I understand the authorities further to establish this, that that principle is not affected by these Acts of Parliament which require registration in order to give or to prevent a priority, but that the conscience of the second purchaser, as I have called him, is equally affected, and that the intention of the Legislature in such acts as those I have referred to was to afford a protection to persons whose consciences were not affected, and not to give the second purchaser whose conscience was affected an opportunity of joining in the commission of that which was a breach of contract and a wrong to the first person who made the bargain. That I understand to be the principle governing cases of this kind and I cannot see how it is not applicable to the present case, the more especially when we bear in mind that there are two sections which expressly say "notwithstanding any notice," and that this is legislation *in*

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pari materiâ with the other statutes so construed, and is legislation after those decisions to which I have referred.

It seems to me therefore that this appeal must be allowed, but I confess that I come to this conclusion, as I have said, with the greatest reluctance. I cannot but, with all submission, doubt very much whether if *A.* and *B.* entered into an agreement with each other, and afterwards *C.* entered into an agreement with one of them which was inconsistent with the first agreement, it would not have been better to have let *A.* and *B.* fight it out and take their remedies against each other rather than bring in the third person. As I understand it, that third person may have been perfectly honest, he may have done his best to ascertain whether the prior contract existed and ought to be enforced, and may have come to the conclusion that it did not exist and could not be enforced, but notwithstanding that his conscience is said to be affected, and he finds himself let in for a lawsuit because somebody told him a heap of untruths which he was unfortunate enough to believe.

That consideration makes me feel reluctance in this matter, and I cannot help thinking that the Legislature in these Acts of Parliament, and especially in this one, intended to prevent the occurrence of what is to my mind the gross injustice which I have pointed out. I think that what the Legislature intended was this: unless the annuitant registers his annuity a subsequent purchaser shall not be troubled with any inquiry as to whether his conscience is affected or not, a place is pointed out where the annuitant may register his interest if he likes, and if he does not he must take the consequences of the subsequent purchaser getting a better title against him. I doubt very much whether the principle of Courts of Equity ought to be extended to cases where registration is provided for by statute. I do not know whether I have grasped the doctrines of Equity correctly in this matter, but if I have they seem to me to be like a good many other doctrines of Courts of Equity, the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases.

Solicitors: *Pilgrim & Phillips; Peacock & Goddard; Cattarns, Jehu, & Hughes.*

Ex parte NEAL. *In re* BATEY.

C. A. 1880 April 29.

Proof in Bankruptcy—Provable Debt—Liability capable of being fairly estimated—Annuity payable to Wife under Separation Deed—Bankruptcy Act,1869 (32 & 33 *Vict. c.* 71), *s.* 31.

By a separation deed between a husband and wife the husband covenanted with trustees to pay to them an annuity of £350, during the joint lives of himself and his wife, for her benefit. The annuity was made determinable in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of anything done, committed, or suffered by the other party after the date of the deed. The annuity was to be proportionally diminished in the event of the wife becoming entitled to any income independent of the husband exceeding £350 a year.

After the execution of the deed the husband filed a liquidation petition:—

Held, that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation:

Held, also, that the trustee in the liquidation was entitled, if he desired it, to have the value assessed by a jury.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 2nd of November, 1876, the wife of *William Batey* filed a petition in the Probate and Divorce Division alleging that divers acts of cruelty and adultery had been committed against her by her husband, and praying that her marriage might be dissolved. The husband, by his answer, denied the charges. The suit came on for hearing on the 21st of July, 1877, when, by the consent of both parties, the jury were discharged without finding a verdict. And it was ordered that the proceedings in the cause should be stayed, a deed of separation being entered into between the parties, the amount of allowance to the petitioner being determined by the Court in the event of disagreement, such allowance to be payable so long as the petitioner should lead a chaste life. The Judge afterwards fixed the allowance to be paid by the husband to the wife at £350 per annum. On the 21st of September, 1878, a deed of separation was executed, to which the husband, the wife, and two trustees were parties. By this deed the husband covenanted with the trustees that, notwith-

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standing the marriage, it should be lawful for the wife to live separate, and that he would not compel her to cohabit or live with him by any suit or other proceeding. And the husband also covenanted with the trustees that he would yearly, during the joint lives of himself and the wife, pay to the trustees the yearly sum of £350 by quarterly payments. And it was declared that the trustees should stand possessed of the money so covenanted to be paid upon trust for the benefit of the wife, or for such person or persons and for such ends, intents, and purposes as she should from time to time or at any time, notwithstanding her coverture, by deed appoint, but without power of anticipation. And, in default of such appointment, the trustees were to pay the same to the wife for her separate use, or apply it for and towards her maintenance and support. Provided always, and it was thereby expressly agreed and declared, that, if at any time thereafter the wife should cease to lead a chaste life, the said annual payment by the husband should absolutely cease and determine. Provided also, that, in the event of the wife becoming entitled to any income independent of the husband exceeding £350 a year, then the payments to be made by the husband to the wife should be diminished to an amount equal to the amount of the excess of her independent income beyond the said sum of £350 per annum. And, in consideration of the covenants on the part of the husband, the trustees covenanted with him that, during all such time as he and the wife should continue to live separate and apart from each other, he should not be in any way liable for the maintenance of the wife, or to pay any debt or debts which she had already contracted or should thereafter contract during the separation, and that the trustees would indemnify the husband against the wife's debts, and that the wife should not commence or prosecute any suit for the restitution of conjugal rights. And it was further declared and agreed that, if the husband and wife should be reconciled to each other and return to cohabitation, or if their marriage should be dissolved by a Court of competent jurisdiction in respect of anything done, committed, or suffered by the other party after the date of the deed, then and in either of such cases the covenants, agreements, and stipulations thereinbefore contained should forthwith become wholly void.

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On the 12th of June, 1879, the husband filed a liquidation petition. On the 29th of January the creditors resolved on a liquidation by arrangement, appointed three trustees, and granted the debtor his discharge.

The trustees of the separation deed tendered a proof in the liquidation for £4752 9*s.* 6*d.*, as the estimated value of the annuity of £350. The trustees in the liquidation rejected the proof, and the Registrar confirmed the rejection, on the ground that the value of the liability under the proof was incapable of being fairly estimated.

The trustees of the deed appealed.

Roxburgh, Q.C., and *Finlay Knight*, for the Appellants:—

The proof ought to have been admitted. The value of the annuity is capable of being fairly estimated in some way or other. The object of sect. 31 was to free the bankrupt or liquidating debtor from every kind of liability, except in the case of unliquidated damages for a tort. The words are much more extensive than those of any previous Bankruptcy Act, and it is almost impossible to conceive of any liability the value of which cannot be estimated under sect. 31: *Ex parte Llynvi Coal and Iron Company* (1); *Ex parte Waters* (2); *Ex parte Blakemore* (3); *Ex parte Pearce* (4).

[JAMES, L.J., referred to *M'Donald* v. *M'Donold* (5), in which it was held that in valuing the "expectancy or interest" of the second and third substitute heirs of entail under sect. 5 of the *Entail Amendment* (*Scotland*) *Act*, 1875, any particular fact which tended to shorten the probable duration of the first heir's life must be taken into account.

An actuary would value an ordinary life annuity according to the tables. But would not the trustee in a bankruptcy be entitled to say that there was something tending to shorten the life of the annuitant, *e.g.*, that he had met with a serious railway accident?]

Winslow, Q.C., and *E. Cooper Willis*, for the trustees in the liquidation:—

The Bankruptcy Act was not intended to relieve a bankrupt

(1) Law Rep. 7 Ch. 28.
(2) Ibid. 8 Ch. 562.
(3) 5 Ch. D. 372.
(4) 13 Ch. D. 262.
(5) 5 App. Cas. 519.

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from the duty of maintaining his wife and family, and to throw the burden of doing so upon his creditors. This deed is really a voluntary settlement by the husband for the benefit of his wife. In this way a man might abstract the bulk of his property from his creditors. That would be contrary to sect. 91.

[JAMES, L.J.:—Are not the trustees purchasers of the annuity?]

The word "purchaser" in sect. 91 means a "buyer" or purchaser for money. The trustees are not purchasers in that sense: *Ex parte Hillman* (1); *Re Meaghan* (2). That cannot be done indirectly which could not be done directly. Sect. 31 recognises the possibility of there being liabilities the value of which cannot be fairly estimated. This annuity is subject to at least three different contingencies. Under the Bankruptcy Acts of 1849 and 1861 it was held that an annuity payable by a husband to a wife under a separation deed, but determinable in the event of cohabitation being resumed, was not provable in the bankruptcy of the husband: *Mudge* v. *Rowan* (3); *Parker* v. *Ince* (4). Sect. 31 of the present Act does not justify the admission of this proof.

JAMES, L.J.:—

I think that the decision of the Registrar must be overruled. The cases at Common Law which have been cited would have been directly in point if the same *Bankruptcy Act* had been in force now which was in force when they were decided. They have not been overruled by anything which I have said in the cases subsequently decided in this Court. On the contrary, I think that they were perfectly right decisions upon the words of the then existing *Bankruptcy Act*. It was, I believe, because of those decisions that the very wide words of sect. 31 of the present *Bankruptcy Act* were introduced, which make every kind of debt or liability provable in bankruptcy, except "demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise," and that whether the value of the liability is "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." The present case is

(1) 10 Ch. D. 622.
(2) 1 Sch. & Lef. 179.
(3) Law Rep. 3 Ex. 85.
(4) 4 H. & N. 53.

really governed by *Ex parte Blakemore* (1), in which we held that the value of an annuity, to a widow defeasible on her marrying again, was capable of being fairly estimated, and was provable in bankruptcy. It seems to me that that decision really determines the present case. It is impossible not to see that this separation deed was a result of the proceedings in the Divorce Court, and that it was executed with the sanction of the Court. The deed contains a provision intended to secure a perpetual separation, and it provides for the contingency of the lady leading an unchaste life. There is a provision also for the improbable contingency of her deriving property from some other source independent of her husband. The value of the annuity must be calculated in the best way it can; like any other breach of contract you must determine the amount of the damages in the best possible way. I think this is what the Legislature intended. It appears to me that the person who says that there is not a provable debt must shew that the value of the liability is incapable of being fairly estimated.

BAGGALLAY, L.J.:—

I am of the same opinion. I think the case is governed by *Ex parte Blakemore*. *Mudge* v. *Rowan* (2) and *Parker* v. *Ince* (3) were decisions on another statute, the words of which differed materially from those of sect. 31 of the Act of 1869. I have no doubt that that section, and particularly the words in the latter clause of it, were introduced for the express purpose of meeting those decisions. Words more large and general it is impossible to conceive. They cover every species of contingency. A separation deed like this is a matter of not unfrequent occurrence.

BRAMWELL, L.J.:—

I am of the same opinion. I think the case is governed by the decisions of this Court which have been cited. But, independently of those decisions, I think I should have come to the same conclusion, though perhaps not without some difficulty. But for

(1) 5 Ch. D. 372. (2) Law Rep. 3 Ex. 85.
(3) 4 H. & N. 53.

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the present *Bankruptcy Act* our decision must have been the same as that in *Mudge* v. *Rowan* (1). But the present *Bankruptcy Act* is very different in its terms from the Act which was then in force. As Mr. *Roland Williams* says in his book on Bankruptcy (2), "Since 6 Geo. 4, c. 16, however, there has been a continuous tendency to relax this rule, but, with the exception of sect. 153 of the Act of 1861, no enactment has directly affected the right of a creditor to prove in respect of damages arising from a breach of contract in cases where the amount of the damages neither had been ascertained, nor could easily and without the intervention of a jury be ascertained. That section affected such cases, but did not go nearly so far as the present Act."

Within my recollection there have been successive Acts passed for this purpose, and I have been surprised and to some extent amused at seeing how the Legislature have been unable to accomplish their object of freeing bankrupts from all claims. Mr. *Williams* gives a list (3) of all the different enactments relating to proof contained in the Acts of 1849 and 1861, in cases in which proof had not been previously allowed. But, although the Legislature had made all those separate provisions, they had not provided for such a case as that which arose in *Mudge* v. *Rowan*. Now, however, they have used as extensive words as it was possible to use, and it is difficult to see how any case could arise which would not come within them. The provision for the possibility of the Court thinking that the value of a debt or liability was incapable of being fairly estimated must have been inserted *ex majori cautelâ*. And it is to be observed that the section only speaks of an estimate being made of the value, not of a valuation. In the present case there is an annuity for the joint lives of the husband and wife; that is capable of valuation. I should suppose, having regard to the decision in *M'Donald* v. *M'Donald* (4), that if there was anything peculiar affecting either of the lives it might be taken into account in estimating the value of the annuity. What would you have to do besides? You must make an abatement for the three contingencies to which the

(1) Law Rep. 3 Ex. 85.
(2) 2nd Ed. p. 158.
(3) Page 159.
(4) 5 App. Cas. 519.

annuity is subject. I am very much inclined to think that these contingencies were inserted in the deed as matters of course by the learned Judge under whose decree this arrangement was come to, and very possibly they ought to be disregarded as immaterial. But, at any rate, it seems to me that it is possible to put an estimate on the value of the claim, and if so, the proof ought to be admitted, however difficult it may be to make the estimate.

Winslow, Q.C.:—The estimate ought to be made by a jury.

JAMES, L.J.:—

I do not see how we can refuse a jury, if it is asked for.

Solicitor for Appellants: *James Neal.*
Solicitor for Trustees: *G. J. Jennings.*

In re ROTHERHAM'S TRADE-MARK.

Trade-Mark — Registration — Word in Foreign Characters — Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91)—*Costs.*

A firm of watchmakers who for many years had been in the habit of using the name "*Tod*" in Arabic characters as a trade-mark for watches sent to a particular firm in the East, applied to have it registered as a trade-mark. The Registrar, by the direction of the Commissioners of Patents, refused to register it:—

Held (affirming the decision of *Bacon*, V.C.), that the mark ought to be registered.

Held, also, that the Court had no jurisdiction to give costs.

THIS was an appeal by the Registrar of Trade-Marks from a decision of Vice-Chancellor *Bacon* (1).

Rigby, for the Appellant:—

The Registrar considers that he cannot discharge his duties properly if they are to include the registering words in Eastern languages, which are to an unlearned eye an unmeaning collection of scratches, and which he cannot keep in his mind.

[JAMES, L.J.:—Why does he want to keep them in his mind?]

(1) 11 Ch. D. 250.

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Because it is part of his duty to refuse to register any trade-mark so like another as to be calculated to deceive. He says at once that these outlandish words are to his eye so like one another that he cannot distinguish them unless they are put side by side.

[BRAMWELL, L.J.:—Can you register a name as a trade-mark?]

Not simply a name; it must be a name written in some peculiar style, as is shewn by sect. 10 of the *Trade Marks Act: Sebastian* on Trade-marks (1). By the 61st of the rules made under the Act which have statutory force the Registrar is to act according to the directions of the Commissioners of Patents. The Commissioners in the present case have directed him to refuse to register these words in unknown characters. No doubt that is subject to appeal to this Court, but the Court will be slow to overrule their decision on a point of this nature. The objection is that the Registrar cannot know what he is doing if he has to register marks the differences between which are to his eye unappreciable.

[JAMES, L.J.:—Assume this mark registered, no harm can result till some one wishes to register something that may be mistaken for it. Such new mark must be advertised, and notice is thus given to all the world, and if no one objects, what harm is done by registering it, though it be something which an ordinary English eye might mistake for the other?]

That is not all; by sect. 6 of the Act the Registrar of his own motion is to refuse to register marks so similar as to be calculated to deceive.

[JAMES, L.J.:—That is only directory. He is to do so as far as he can.

BRAMWELL, L.J.:—The Act says that any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of the Act may be registered under the Act. You say that only means English words.]

That is so.

(1) Page 220.

[JAMES, L.J. :—Why does it not include combinations of Arabic words? According to your contention, the mark in *Gout* v. *Aleploglu* (1) could not be registered.]

The Legislature was legislating for British subjects, and when speaking of a name written in a distinctive manner, must be understood as speaking of something which they could distinguish, and not what might be taken to be the marks made by a spider crawling over the paper.

Sir *H. Jackson*, Q.C., and *Moloney*, *contrà*, were not called upon.

JAMES, L.J. :—

There may be a difficulty in dealing with such marks as this, but I think that the Registrar must put up with the possibility, which I think is a very remote possibility, of his suffering some inconvenience, and also of somebody else suffering some inconvenience, because he is not able sufficiently to distinguish words written in Oriental characters. The Vice-Chancellor was of opinion, as it seems to me quite rightly, that this was a distinctive device. In *Gout* v. *Aleploglu*, the Plaintiff's name and the word "*pessendede*" in Turkish characters were held to be a distinctive device and a good trade-mark. If so, why should it not be registered if now brought for registration. I cannot see any distinction between "*pessendede*" in Turkish characters and "*Tod*" in Arabic characters, and I think that this device ought to be registered. It is a distinctive device, and a word which anybody knowing that language would understand.

BAGGALLAY, L.J. :—

I am of the same opinion. It seems to me that this device comes within the second definition contained in the 10th section of the Act; for it is the name of an individual printed in a particular or distinctive manner.

BRAMWELL, L.J. :—

I am of the same opinion.

(1) 6 Beav. 69, n.

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Sir *H. Jackson* asked for costs, but the Court, though of opinion that it was a case of hardship, and that the appeal ought not to have been brought, held that they had no jurisdiction to give them.

Solicitors: *Whateley, Milward, & Whitehead; The Solicitor to the Treasury.*

C. A. 1880 *June* 2.

JONES *v.* RIMMER.

[1877 J. 108.]

Vendor and Purchaser—Misleading Particulars of Sale.

Leaseholds in *Liverpool* were put up for sale under the direction of the Court in four lots, under a condition that the purchasers should enter into the usual covenant for paying and observing the rents and covenants of the leases, and indemnifying the vendors therefrom. There was no condition as to the leases being produced, nor that the purchasers should be deemed to have notice of their contents. As to one of the lots, the particulars stated the rents at which the different parts of it were underlet, and the amount of a mortgage on it; but, owing to a slip, did not mention that it was subject to any ground rent. It was, in fact, subject to a ground rent of £43. The other lots were leaseholds held under the corporation of *Liverpool*, which usually reserves only a nominal rent on its leases. A purchaser bought this lot for £1400, and applied to be discharged from his purchase, both he and his solicitor deposing that they were led by the particulars to believe, and did believe, that the property was not subject to any ground rent:—

Held (affirming the decision of *Little*, V.C.), that the purchaser was entitled to be discharged.

THIS was an appeal by the Plaintiffs in the action from an order of the Vice-Chancellor of the County Palatine of *Lancaster* discharging a purchaser of Lot 11 of the estates sold in the cause from his purchase.

The estates were put up for sale at *Liverpool* in eleven lots, six of which were freehold, one copyhold, and four leasehold. Lots 8 and 9 were held under leases from the corporation of *Liverpool*, as appeared by the particulars, and Lot 10 appeared from the conditions to be held under the corporation. The remaining Lot 11 was leasehold, and was described as follows in the particulars:—

"All those four leasehold houses situate and being Nos. 165–167, 169, and 171, *Great Howard Street, Liverpool*, and now let at the

respective rents of £7 10*s.* per quarter, £7 10*s.* per quarter, £4 per month, and £12 per quarter. And all that leasehold yard at the back of the last-mentioned houses, and situate in *Sand Street*, in *Liverpool* aforesaid, containing thirty-five square yards, or thereabouts, let at a rent of £5 per quarter. The whole held for the residue of a term of seventy-five years from the 16th of September, 1845. This lot is offered for sale subject to a mortgage of £500 bearing interest at £5 per cent., vested in mortgagee of Lot 3."

The conditions provided that the title to Lot 11 should commence with an indenture of lease dated the 16th of September, 1845, made between *John Shaw Leigh* of the one part, and *Robert Marrow* of the other part. It was further provided that the respective purchasers of Lots 8, 9, 10, and 11 respectively should, by the respective assignments to them, enter into the usual covenants for paying and performing and observing the rents, covenants, and conditions of the respective leases, and indemnifying the vendors and the estate of their testator *Robert Marrow* therefrom.

The conditions did not contain any stipulation that the purchaser should be taken to have notice of the contents of the leases, nor any statement as to their production or inspection.

No mention was made in the particulars or conditions that Lot 11 was subject to any ground rent. It was, in fact, subject to a ground rent of £43 17*s.* 6*d.*

B. MacPoland, the occupier of part of Lot 11, read the particulars, and authorized his solicitor to bid for that lot up to £1600. The solicitor accordingly bid for the lot, and was allowed as purchaser at £1400. The purchaser deposed that he was present at the sale, and that nothing was said in the auction room about the property being subject to any rent; that he had believed that everything affecting the value of the property would be stated in the particulars and conditions; and that, if he had known that the property was subject to a ground rent of £43 17*s.* 6*d.*, he would not have allowed more than £700 to be bid on his behalf. The solicitor deposed that he was familiar with sales at *Liverpool*, that he and his client had consulted together about the sum to be offered for the lot, that it never occurred to him that the property was subject to any ground rent, and that no information about it

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was given in the auction room. He further deposed that a large quantity of leasehold property was from time to time sold by auction in *Liverpool;* that the greater part of it was held under leases for seventy-five years, partly from the corporation of *Liverpool,* partly from the Earl of *Derby,* partly from the Earl of *Sefton,* and partly from *John Shaw Leigh* and other large landowners; that the greater part of the land held under the corporation of *Liverpool* was subject only to a peppercorn rent, but some of it to substantial rents. That as to the land demised upon lease for seventy-five years by *John Shaw Leigh,* some was held at a nominal rent, but more on ground rents; and that in this case he assumed the non-existence of ground rent through the non-mention of it.

It appeared that the amount of ground rent payable in respect of Lot 11 had been mentioned in the draft particulars of sale, but by mistake had been struck out by the deputy registrar in settling them.

Vice-Chancellor *Little* discharged the purchaser with costs. The Plaintiffs appealed.

North, Q.C., and *Neville,* for the Appellants:—

If a vendor sells a leasehold with a mere reference to the lease, not professing to give any statement of its contents, the purchaser is put upon inquiry and is presumed to know the contents of the lease. It is no doubt usual to state the rent in particulars of sale, but it is equally usual to state the fact of there being no rent or a peppercorn rent, so that no inference of there being no rent can be drawn from the omission. On the authorities a purchaser buys with notice of everything in the lease, unless the vendor makes a representation about its contents: *Hall* v. *Smith* (1); *Cox* v. *Coventon* (2). The purchaser admits that he knew that the leases by *John S. Leigh* were usually at a substantial rent.

[JESSEL, M.R.:—Misrepresentation is not got rid of by constructive notice.]

No, but here there is no misrepresentation at all, and the stipu-

(1) 14 Ves. 426. (2) 31 Beav. 378.

lation that the purchasers shall pay the rents and observe the covenants gave him notice of there being a rent.

Macnaghten, Q.C., and *Clare, contrà* :—

The description, though not actually incorrect, is misleading. The particulars are minute as to matters tending to shew the value of the property—the amounts for which its different parts are let are stated, and the amount of the incumbrance upon it is given, and a purchaser had a right to assume that all material particulars were furnished. It is hardly possible to contend that a description which misled not only the purchaser but his experienced local solicitor, was not calculated to deceive.

North, in reply.

JESSEL, M.R. :—

During the argument of this case I have felt what I very seldom feel, considerable difficulty, because there is a strong technical argument in favour of the Appellants, but, as it appears to me, the common sense and justice of the case are in favour of the Respondent. The real question I think is, Is this a fair particular; is it one in which a purchaser is told what he has to buy, so as to enable him to form an idea of the value of the thing to be purchased, or might he not naturally and fairly infer from such a particular as this (as not only he but his solicitor who bid for him at the sale swear that they did), that there was no ground rent reserved on this lease. Now, it is quite true that the particular is silent as to the ground rent, but it is very distinct indeed as to everything to be received. It tells you that the houses are let at the respective rents of so much a quarter or month, and then it says, "the whole held for the residue of a term of seventy-five years from the 16th of September, 1845. This lot is offered for sale subject to a mortgage of £500, bearing interest at 5 per cent." I have no hesitation in saying that the fair construction of that is that there is no substantial rent reserved in the lease. We must not indeed forget that the other lots are lots of leasehold houses held under the corporation of *Liverpool* upon which there is usually only a nominal rent, and the condition which has been referred to does

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not apply to Lot 11 only, but to Lots 8, 9, 10, and 11, and provides that the purchasers of them shall enter into the usual covenants for paying and performing and observing the rents, covenants, and conditions of their respective leases," so that a purchaser, knowing that the corporation leases are held as a rule at nominal rents, would not by that condition alone be led to the conclusion that these four leasehold houses were held at a substantial rent. Then are we to adopt the doctrine of constructive notice in such a case as this? No doubt the purchaser, if he had been a careful purchaser, would have inquired. But is it for the vendor who sends out such a statement as this of the nature of the property to say that the purchaser only was careless? I think the vendor also was careless. It cannot be said to be a fair mode of drawing a particular of sale of leasehold houses subject to a ground rent of £43 a year, to say nothing about the rent. I have never seen such a particular, though I have had a very great deal of experience both at the Bar and on the Bench as to sales of leasehold property. I asked both sides whether anybody else had ever seen such a particular. Not only did I not obtain any response to that question, but I find that in this very case the omission had occurred through a mere slip, that the particular was intended to be in the proper form, but that by some accident the pen had been drawn through the statement of the ground rent. It is said, and no doubt truly said, that as a rule when leaseholds are sold which are held at a peppercorn rent, or free from rent, or at a nominal rent. that also is stated, and of course if the purchaser had been careful he would have inquired; but still I think not only that he was misled, but, if I may say so, that he had a fair title to be misled, and consequently that this is not a case in which the Court ought in the exercise of its discretion to direct specific performance. It must not be forgotten that the Court has refused specific performance even where the mistake of the purchaser has not been induced by any act or omission of the vendor, and *à fortiori* it ought to be refused where the omission of the vendor to draw his particulars in the fair and ordinary way has conduced to that mistake. I do not feel inclined to make any alteration in the Vice-Chancellor's order even as to costs, and I think that his decision ought not to be disturbed.

COTTON, L.J.:—

I am of the same opinion for the same reasons.

THESIGER, L.J.:—

I concur.

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Solicitors: *J. H. Lydall; Singleton & Tattershall.*

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[1878 J. 22.]

C. A. 1880 *June* 30.

Practice—Reference to Arbitration—Making Award a Rule of Court—Appeal —Common Law Procedure Act (17 & 18 *Vict. c.* 125), *s.* 17.

Where a reference to arbitration has been made under an agreement, the submission ought to be made a rule of Court, according to the practice in the Common Law Courts before the Judicature Acts.

But where a reference to arbitration had been directed by the Judge of the Chancery Division at the trial, and afterwards the award had been made an order of Court, and that order was not appealed from, it was *held* by the Court of Appeal that the award could not be disputed even though it was bad on the face of it.

THIS was an appeal from an order of Vice-Chancellor *Hall*, made in Chambers.

The action was brought to obtain a declaration that the Defendant, who was the Plaintiff's brother, was bound, under the terms of the will of Mr. *J. Jones*, to provide a home for the Plaintiff as long as she remained a spinster, either in his house in *London* or in *Wales*, or that the Plaintiff was entitled to compensation in damages. At the trial of the action in April, 1879, it was ordered by consent that all matters in difference in the action should be referred to arbitration, and by the like consent that all matters in difference between the parties should be decided by the arbitrator in the same manner and to the same extent as the same would have been decided by the Court on the trial of the action.

The arbitrator made his award on the 28th of July, 1879, whereby he awarded that the Defendant should pay £140 as

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compensation to the Plaintiff for the past, and £70 a year for a provision for the remainder of her life, or so long as she should continue a spinster.

On the 15th of November, 1879, the Defendant's solicitor wrote to the Plaintiff's solicitor stating that the Defendant had agreed to accept the award, and inclosing a cheque for the amount of his share of the costs.

On the 27th of November, 1879, the Plaintiff obtained an order from the Vice-Chancellor making the award an order of the Court, to be observed and performed by all parties thereto. Notice of this motion was served on the Defendant, but he did not appear.

The Defendant paid the sum of £140 for past compensation and £35 for the first payment of future provision, but refused to pay any more.

On the 12th of May, 1880, the Plaintiff obtained in Chambers an order that the Defendant should pay to the Plaintiff within four days £35 for half a year's instalment due on the 25th of March, 1880. The Defendant appealed from this order.

Vaughan Williams, and *Beale*, for the Appellant:—

We object to the award as being *ultrà vires*.

Robinson, Q.C., and *Whitehorne*, for the Plaintiff, took the preliminary objection that the award had been made an order of Court, and had not been appealed from.

Vaughan Williams, and *Beale*, for the Appellant:—

The effect of making the award an order of Court is equivalent to making the submission a rule of Court, which is the usual practice in the Common Law Courts. Any party who has reason to complain of the award may wait till it is attempted to be enforced, and then resist judgment on it, if it is bad on the face of it, as this is. We do not desire to set aside the award, but only to resist its performance so far as it is *ultrà vires*.

JESSEL, M.R.:—

In cases of submission to arbitration it was very usual in the

Court of Chancery to make the award an order of Court: *Seton* on Decrees (1); Cons. Order XXIII., rule 23. But as it is important that under the Judicature Acts the practice of all the Courts should be as far as possible uniform, I have ruled in my Court that the proper course is to make the submission a rule of Court, according to the practice of the Common Law Divisions. However, in the present case the reference to arbitration was made by the Court itself, and the award has been made an order of Court, and has never been appealed against. It is therefore as binding as any other order of the Court. I think, therefore, that the preliminary objection must prevail, and the appeal must be dismissed with costs.

COTTON and THESIGER, L.JJ., concurred.

Solicitors: *Blake & Haseltine; Gregory, Rowcliffes, & Rawle.*

(1) 4th Ed. p. 403.

(4 See Re Aylesby 11 M 18 79 451.

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March 5.

GINESI *v.* COOPER & COMPANY.

[1880 G. 30.]

Trader—Sale of Business and Goodwill—Vendor setting up in same Business—"Goodwill"—Fraud—Injunction.

A trader who has sold his business and goodwill to another for value must abstain not only from soliciting orders from but also from dealing with the old customers.

The meaning of "goodwill" explained.

Churton v. *Douglas* (1) and *Cruttwell* v. *Lye* (2) considered.

Form of injunction.

THE Defendants, "*Samuel Cooper & Company*," for many years prior to the month of November, 1877, carried on an extensive business as stone merchants under the style of "*Cooper & Hampson*," at *Clarence Wharf, Rotherhithe*, and at two depôts, the *Midland Railway Company, St. Pancras*, and the *Great Northern Railway Company, King's Cross*, and in so doing had acquired a very valuable connection. The said *Cooper* and *Hampson* were now trading as "*Samuel Cooper & Company*."

The Plaintiff, *Samuel Ginesi*, a stone merchant of *Leeds*, in the month of November, 1877, agreed to purchase, as from the 29th of September, 1877, the business of the Defendants *Cooper & Hampson*, together with the goodwill thereof, upon the terms of his paying to the Defendants £6565 for the goodwill, and taking the plant and stock at a valuation.

The Plaintiff accordingly paid to the Defendants *Cooper & Hampson* the said sum of £6565, and the sum of £9050 for the plant and stock, whereupon, on the 12th of November, 1877, the Defendants executed leases to the Plaintiff of the premises at *Rotherhithe*, and at the same time executed an agreement, made between themselves and the Plaintiff, as to the use of the name of *Cooper & Hampson*, which, after reciting that the Defendants had sold their business to the Plaintiff, provided that the Plaintiff should have the exclusive right to trade under the name of "*Cooper, Hampson, & Company*" for two years, such name not to

(1) Joh. 174. (2) 17 Ves. 335.

be altered or used in conjunction with any other name, except as "*Samuel Ginesi, late Cooper & Hampson,*" but that nothing in the said agreement should prevent the Plaintiff, either during the period of two years or afterwards, from using his name in conjunction with that of "*Cooper, Hampson, & Company,*" in such a manner only as to shew that the Defendants *Cooper & Hampson* were not partners of the Plaintiff.

On the day they executed the agreement *Cooper & Hampson* sent to their customers circulars announcing that they had retired from the business, and that they had transferred the same, with the whole of their stock and plant, to the Plaintiff, who would carry on the trade in all its branches under the style of "*Cooper, Hampson, & Company,*" and recommending the Plaintiff as their successor.

In the month of November, 1879, the Defendants recommenced business as stone merchants, under the style of "*Samuel Cooper & Company,*" in *King William Street, City,* and thereupon proceeded to solicit orders from or endeavour to obtain the custom of the old customers of the firm of *Cooper & Hampson* in various ways, and in particular by distributing business cards and by sending round for orders their former manager, who had been taken over by the Plaintiff on his purchase of the business, but who had recently left his employ and had been re-engaged by the Defendants. The result was that the Defendants in several instances obtained and executed the orders of their old customers, thereby causing, as the Plaintiff alleged, serious injury to the business purchased by him.

Under these circumstances the Plaintiff now moved for an injunction to restrain the Defendants from soliciting or in any way endeavouring to obtain the custom of or orders from such of the customers of the Plaintiff as were customers of *Cooper & Hampson* prior to the 29th of September, 1877, or from attempting to take away any portion of the business purchased by the Plaintiff from the Defendants in September, 1877, or from doing any act prejudicial to such business.

Davey, Q.C., and *Boome,* for the Plaintiff.

Marten, Q.C., and *C. T. Mitchell,* for the Defendants, contended

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that there was nothing in the agreement to prevent them from setting up a new business; that the "goodwill" sold was only the goodwill in connection with the premises where the original business had been carried on; that the injunction asked was too extensive in its terms, inasmuch as the Defendants were entitled to take away the business in the course of fair and open competition by dealing with any old customers who might choose to come to them.

They cited *Steuart* v. *Gladstone* (1); *Labouchere* v. *Dawson* (2); *Churton* v. *Douglas* (3); *Cruttwell* v. *Lye* (4); *Hudson* v. *Osborne* (5).

JESSEL, M.R.:—

The Lord Justice *James* has said that the command "Thou shalt not steal" is as much a portion of the law of Courts of Equity as it is of Courts of Law.

The proposition, as I understand it, which has been gravely argued before me is this, that a trader who has sold for value his business and goodwill to another man is entitled, notwithstanding, to solicit his old customers to deal with him just as if no sale had ever taken place. I will, first of all, state the facts of the case. [His Lordship stated them, and continued:—] In my opinion, the Defendants having sold the business, the attempt to take it away from the Plaintiff in the way I have mentioned is neither a lawful nor an honest attempt; and I consider that I should not be performing my duty in an adequate and proper manner if I hesitated for a moment to state that that was my opinion.

Then I am told that there is some authority which compels me to say that men who have sold their business for £6000 are entitled to solicit the old customers of the business and to carry on the old trade which they have sold. I should have been very much surprised if any Equity Judge had ever laid down any such proposition. The exact contrary was decided in the case of *Labouchere* v. *Dawson*. That case is an authority for saying that a man who has sold the goodwill of his trade or business

(1) 10 Ch. D. 626.
(2) Law Rep. 13 Eq. 322.
(3) Joh. 174.
(4) 17 Ves. 335.
(5) 39 L. J. (Ch.) 79.

must not solicit the old customers to deal with him; but I go further, and say that he must not deal with the old customers. It is not absolutely necessary perhaps to decide that on the present occasion, but I state it because I think the proposition should be thoroughly understood as to what the meaning of selling a trade or business is.

The present injunction asked from me is only to restrain the Defendants from soliciting the old customers and from taking away the Plaintiff's business, which of course must be right anyhow; but if I had been asked, I certainly should have prevented their dealing with the old customers. Can it be tolerated that men who have sold their business, including the benefit of their connection—here they have sold their trade, business, and "goodwill;" I will come in a moment to what "goodwill" means—can immediately after take away the benefit of that connection so sold. I gave an illustration during the course of the argument, which I will repeat. Suppose a solicitor sells his business, say at five years' purchase, which is by no means uncommon, could he, having offices on the first floor, immediately afterwards go on to the ground floor, paint up his name and receive his clients as usual because they choose to come to him, even if he did not actually ask them to come and transact their business with him? The answer would be that he was stealing that which he had sold, and any conduct more outrageous or more opposed to morality or law could not well be imagined.

Suppose, instead of being a solicitor, he was a surgeon-dentist who had rooms on the first floor and then went to the ground floor in the same way; or suppose it was the case of a photographer—probably I could name a dozen other trades or businesses in which personal connection is a very large element in the success of the particular trade or business—the same observation applies: and it applies equally to a case such as we have here, that of a stone merchant. It is not suggested that the trade here is attached to the wharf or to the *Midland Depôt* or to the *Great Northern Depôt:* it is a connection formed by years of work. The Defendants know where to sell the stone; they know where to buy the stone, and probably know how to deal to the best advantage in the different qualities of the stone.

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Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?

I will now look at the authorities which were cited to me in support of that contention. In the case of *Churton* v. *Douglas* (1) Vice-Chancellor *Wood* says (2): "It was argued that in *Shakle* v. *Baker* (3), *Cruttwell* v. *Lye* (4), and *Kennedy* v. *Lee* (5), Lord *Eldon* has laid down the principle that an assignment of the 'goodwill' of a trade *simpliciter*"—this was the case of a contract to sell the trade or business as well as the goodwill—"carries no more with it than the advantage of occupying the premises which were occupied by the former firm, and the chance you thereby have of the customers of the former firm being attracted to those premises. But it would be taking too narrow a view of what is there laid down by Lord *Eldon* to say that it is confined to that. 'Goodwill,' I apprehend, must mean every advantage—every possible advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

Now I cordially agree that "any other matter" does not mean the connection formed in the business. But attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing which the late firm sold, and they really had nothing else to sell in the shape of goodwill.

Then the other case cited was that of *Cruttwell* v. *Lye*, which was a very peculiar case; it was not like the sale by a trader himself, because it was the sale of a trade by the assignees of a bankrupt trader. I agree that for some purposes there is no distinction, but for other purposes there is a distinction. The assignees can only sell property, but the trader himself can sell,

(1) Joh. 174. 5 Jur. N.S. 887.
(2) Ibid. 188. 5 Jur. N.S. 890.
(3) 14 Ves. 468.
(4) 17 Ves. 335.
(5) 3 Mer. 452.

not only the property, but, if I may so express myself, a negative right as against himself. He can stipulate that he will not carry on the business, but the assignees—or, as they are now called, the trustees—of a bankrupt cannot do that; they can only sell the property. The selling of a trade or business by the assignees is not quite the same thing as the selling of a trade or business by the trader himself. That case does not, however, apply to the present, because the decision in the present case will be independent of the peculiarities existing in *Cruttwell* v. *Lye* (1).

Lord *Eldon* says (2): "The question then is, whether upon a fair understanding, or representation, agreeable to the fact, this person is carrying on the Plaintiff's trade"—that is the substance. Is he carrying on the business which he has sold?

There were some curious points raised in that case. The bankrupt did not carry on the carrying trade—which was the trade there—by the same road. He used the same *termini*, but he went by a different road. It was the case of a waggon-carrier who had been carrying on business in two different places; the business had been sold by auction in two lots, and the question was whether the sale of the business meant the business itself, or only the goodwill attached to the property sold.

Now, as I have often said, I have nothing to do with the actual facts in considering the value of an authority. I have only to deal with the facts as decided by the Court to be the facts—the facts on which the judgment was founded. Whatever view may be taken of the wording of the particulars of sale which are stated in *Cruttwell* v. *Lye*, Lord *Eldon* has told us what he considered they meant. He says (3): "The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place." He did not consider there that there was any connection except the chance of customers, who wanted to go by waggon, going to the old waggon-yard. That was the sort of business there. He said that that was all that was to be considered as being sold, or understood to be sold, or intended to be sold. Of course in such a business as that there was really

(1) 17 Ves. 335. (2) 17 Ves. 342.
(3) 17 Ves. 346.

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nothing more. Then he says: "Fraud would form a different consideration; but if that effect is prevented by no other means than those which belong to the fair course of improving a trade, in which it was lawful to engage, I should by interposing carry the effect of injunction to a much greater length than any decision has authorized, or imagination ever suggested."

Then he says: "What farther was done? The bankrupt advertises that he is reinstated in the carrying business; and, though that expression may have a tendency to misconception, yet he is in a fair sense reinstated, if, being at liberty, he has availed himself of that situation to set up again that carrying business. It amounts to no more than that he asserts a right to set up this trade, and has set it up, as the like, but not the same, trade with that sold, taking only those means which he has a right to take to improve it; and there is no fact amounting to fraud upon the contract made with the Plaintiff." That is the distinction. In the present case there is, in my opinion, a fraud on the contract. Lord *Eldon* goes on to say: "The question whether, under the circumstances, the Plaintiff is to carry the agreement into execution, if the assignees have taken from him actively the benefit of that contract, is very different; but, whatever opinion may be held upon this transaction in that view of it, I do not see the fraud upon which, as a Judge in Equity, I can lay my hand; and I dare not from this place so deal with it." So that he came to the conclusion that what the bankrupt was doing was not an interference with that which was sold, which was simply the chance of customers resorting to the old place; and that he had not committed a fraud on any contract entered into by him or his assignees; and therefore he decided that he could not interfere.

How that case bears out the proposition that a man who has sold a business may the next day set up in the same business, that is, solicit the same customers and do the same trade, buy at the same place, and sell at the same place, and in all respects carry on the identical business which he has sold—I myself do not understand. It is only one illustration of many which have come before me—as indeed was once said by an eminent Lord Chancellor—that counsel sometimes have sought for an authority for lack of argument.

Indeed if that authority of *Cruttwell* v. *Lye* (1) is rightly considered, it appears to me to shew that if Lord *Eldon* had thought that what the bankrupt was doing was a fraud on the contract, he certainly would have granted the injunction.

That, as I have said, is my opinion of the present case, and I have no hesitation in granting the injunction asked; it should, however, be limited to soliciting orders for goods similar to those dealt in by *Cooper & Hampson* at the time of the sale.

His Lordship then granted an injunction restraining "the Defendants, their clerks, servants, agents, workmen, and others, until judgment in this action, or until further order, from soliciting, or in any way endeavouring to obtain the custom of or orders for goods similar in character to those dealt in by *Cooper & Hampson* before the 29th of September, 1877, the date of the sale to the Plaintiff of the business of *Cooper & Hampson*, from such of the customers of the Plaintiff as were customers of *Cooper & Hampson*, or from attempting to take away any portion of the business bought by the Plaintiff from the said *Cooper & Hampson* in September, 1877."

Solicitors: *G. & W. Webb; Simpson & White.*

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[1878 A. 176.]

Covenant to insure Life—Absolute or Conditional—Breach—Damages.

By a Scotch marriage settlement dated the 18th of August, 1873, the husband assigned to trustees two policies on his life for £5000 each, expiring respectively on the 2nd and 3rd of July, 1875; and he covenanted "on or before the 2nd of July, 1875," to insure his life in the names of the trustees in the sum of £10,000; the existing and future policies to be held upon trusts for his wife and children.

The husband took no steps towards effecting a new policy until the 1st of July, 1875, shortly before which date his health, which had previously been

(1) 17 Ves. 335.

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good, had become so bad that he was unable to effect an insurance, and in September following he died:—

Held, that the life having become uninsurable on the 1st of July, 1875, did not relieve the husband from the obligation to insure or pay damages, and that accordingly his estate was answerable in damages to the trustees of the settlement.

ADJOURNED SUMMONS.

By a Scotch settlement dated the 18th of August, 1873, executed upon the marriage of *George Arthur* and *Helen Arthur* his wife, the said *George Arthur* assigned to trustees two policies of assurance on his life for £5000 each, expiring respectively on the 2nd and 3rd of July, 1875; and further "bound himself on or before the 2nd of July, 1875, to take out and effect upon his own life, for the full term thereof, in the names of the trustees, from such insurance company as should be approved of by them a policy or policies for the total amount of £10,000, to replace the two policies before assigned." And it was declared that the existing and future policies should be held by the trustees upon trusts for the benefit of the wife and children as therein mentioned.

George Arthur duly paid the premiums on the policies already assigned, but took no steps towards taking out a new policy until the 1st of July, 1875, shortly before which date his health, which had previously been good, had become so bad that he was unable to effect an insurance. He continued in ill health until the 20th of September, 1878, when he died, having by his will, dated the 2nd of February, 1878, directed that the trustees thereof should hold his residuary estate—after payment thereout of his debts, which he charged thereon (distinctly declaring that in case he should not have insured his life in manner provided by his marriage settlement, any money which should be required in order to make up the full amount which would have been receivable at his decease in respect of an insurance on his life for £10,000 should be treated as a debt owing by him)—upon the trusts therein mentioned.

There were two children of the marriage. Mrs. *Arthur* predeceased her husband.

The action was a creditors' action for the administration of *George Arthur's* estate, and this was a claim by the trustees of his

marriage settlement to be admitted as creditors on the estate for the £10,000 for which he had covenanted to insure his life.

It was said that the estate would only be insolvent if the claim of the trustees were allowed.

Macnaghten, Q.C., for the summons, was stopped by the Court.

Davey, Q.C., and *Jason Smith*, for the Plaintiffs:—

The question is, What is the nature of this covenant? Is it absolute or conditional? We submit that it is not an absolute covenant; that is to say, it is not a covenant to insure in any event, but a covenant conditional on the life of the covenantor being insurable on the last day given for the performance of his covenant, that is, on the 2nd of July, 1875. The parties to the contract must be taken to have known, at the time it was entered into, that the covenant to insure was—as, we submit, all covenants for life insurance are—contingent on the life of the covenantor being insurable: the covenant therefore implies that the life shall be insurable, but on the 2nd of July, 1875, it was absolutely uninsurable. If the performance of a contract has been rendered impossible, as it has here, by the "act of God," the contracting party is not liable in damages, the exception of the "act of God" being implied in the contract.

The law is thus stated in *Baily* v. *De Crespigny* (1); *Leake* on Contracts (2); "The act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract."

There is no sound distinction between a contract of this kind and a contract for personal service, as to which the law is settled. The rule, no doubt, is that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible: but this rule is

(1) Law Rep. 4 Q. B. 180, 185. (2) Page 684.

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only applicable where the contract is positive and absolute, and not subject to any condition, either express or implied: *Taylor* v. *Caldwell* (1). The principle is that in a contract in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance: *Taylor* v. *Caldwell.* The rule that a contract for the performance of personal service is discharged or excused by death or incapacity of performance caused by illness or accident is established by a train of authorities: *Shep.* Touch. (2); *Williams* v. *Lloyd* (3); *Boast* v. *Firth* (4); *Robinson* v. *Davison* (5); *Poussard* v. *Spiers* (6); *Simeon* v. *Watson* (7); *Appleby* v. *Meyers* (8); *Howell* v. *Coupland* (9).

[They also mentioned *Hall* v. *Wright* (10).]

Macnaghten, in reply :—

This is a covenant to insure "on or before the 2nd of July, 1875." The covenantor is therefore given a period of nearly two years in which to perform his covenant. Why, if he chooses to wait till the last day of the period and to incur the risk of not then being in good health, or of meeting with an accident, should he be relieved from his contract?

[JESSEL, M.R.:—Can it be said that it was in the reasonable contemplation of the parties that the man's estate should be liable in such large damages as are now claimed, in case he personally failed to perform his covenant? If so, one would rather expect to find a covenant that his "executors" would pay: but we find nothing of the kind here.]

This being a Scotch settlement, one does not expect to find the same provisions as in an English settlement. The clear object and the reasonable meaning of the settlement is to provide a fund for the widow and children. If your Lordship should consider us

(1) 3 B. & S. 826.
(2) Page 180.
(3) W. Jones, 179.
(4) Law Rep. 4 C. P. 1.
(5) Ibid. 6 Ex. 269.
(6) 1 Q. B. D. 410, 414.
(7) 46 L. J. (C.P.) 679.
(8) Law Rep. 1 C. P. 615; Ibid. 2 C. P. 651.
(9) Law Rep. 9 Q. B. 462; Ibid. 1 Q. B. D. 258.
(10) E. B. & E. 746.

entitled to damages, the measure of them should be ascertained in the manner directed in *Hawkins* v. *Coulthurst* (1).

JESSEL, M.R.:—

In my opinion the effect of the covenant is to create a debt. I do not agree that the Court is to cut down the absolute meaning of covenants, that is to say, covenants in absolute terms, without sufficient reason. There is here a covenant to effect an insurance on or before a given day. The covenantor had nearly two years in which to do it, but he put off doing anything till a day or two before the last day: however, just previously he became so ill, and he thenceforward continued so ill, that no policy could be effected on his life. Now, it does appear to me to be clear that he cannot avail himself of that negligence or omission on his part to take any steps towards the performance of his covenant till a day or two before the expiration of the two years, to say that there has been no breach of the covenant. There was a time, nearly two years, during which he might have performed it, and he did not perform it during the time when he could have performed it. Why is he not to be answerable in damages? It seems to me that he has committed a breach of the covenant, and not the less so because misfortune subsequently overtook him, for he might have performed it up to a short period before the expiration of the time. It is no answer to say that there would have been no breach if he had done it on the last day, because he has not done it on the last day; and, whether or not he would be excused from performance if it had been a covenant to do it on that day, it appears to me that is not an excuse when he has not done it. On that ground I should be in favour of the applicants.

Then there is a very curious question on the other ground, and I quite admit that my mind has wavered during the argument between the two views which have been presented to me. I thought at first it was very clear that it was an absolute covenant to provide £10,000 for the widow and children; but on looking into the deed more carefully I was not at all sure that it was an absolute covenant. The real point I have to consider is this: to put it in the words of the learned Judge who gave judgment in *Baily*

(1) 5 B. & S. 343.

M. R. 1880 *In re* ARTHUR. ARTHUR v. WYNNE.

v. *De Crespigny* (1), Sir *James Hannen*, "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened."

It is put in a very similar way by the present Lord *Blackburn*, when Mr. Justice *Blackburn*, in *Taylor* v. *Caldwell* (2). After stating the rule that the contractor must either perform his contract or pay damages, he says (3): "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done: there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Now, in this case, which is a contract to insure, the parties must have known that not only life may fail, but health may fail; and although the man was in a good state of health at the moment, they must have known very well that there was a possibility of his health becoming permanently injured, and possibly in a very short time afterwards. But we all know that, though a man's health may be failing, there are insurance offices which will insure, though at a higher rate of premium; and therefore the mere contingency of health failing, which I think must have been in the contemplation of the parties, would not necessarily make the life uninsurable.

(1) Law Rep. 4 Q. B. 185. (2) 3 B. & S. 826.
(3) 3 B. & S. 833.

But then it is said that the man's health may fail to such an extent, as it did here, that no insurance office will take the risk. Can I say that such an event was excluded from the contract? Can I say that it cannot reasonably be supposed to have been within the contemplation of the contracting parties? It does appear to me, looking at this whole settlement, that, though the parties may not have actually had in contemplation the very event which has happened, you cannot say that it cannot reasonably be supposed to have been in their contemplation. They might have thought that the moment the man's health began to fail he would go and insure before it became so bad that he could not insure; and, considering the absolute terms of the covenant, considering the nature of the contract and what must have been the fair contemplation of the parties, namely, to insure a provision for the widow and children, it seems to me that I should be going beyond the decided cases in attempting to apply the principle there laid down to such a contract as this. I must, therefore, hold that there is no implied exception of the kind suggested on the part of the Respondents. As I said before, that question is to my mind of much greater difficulty than the first. On that point I think the applicants are also entitled to succeed.

The amount of damages payable to the trustees of the settlement was fixed by arrangement between the parties.

Solicitors: *Johnsons, Upton, Budd, & Atkey; R. S. Taylor, Son, & Humbert.*

M. R.

1880

May 14.

In re CROWE'S TRUSTS (No. 2).

Practice—New Trustees—Vesting Order as to Stock—No Legal Personal Representative of Survivor of Original Trustees—Form of Order—Trustee Act, 1850—*Trustee Extension Act*, 1852.

Form of vesting order as to stock settled by will where the survivor of the two original trustees has died without a legal personal representative, and new trustees have been appointed under the will.

In re Crowe's Trusts (1) corrected.

THIS matter (1) was mentioned on a subsequent day by *Kekewich*, Q.C., who appeared for the *Bank of England*, and said that the bank refused to act upon the order as drawn up, on the ground that according to the case of *In re Dalgleish's Settlement* (2), before the Court of Appeal, and other cases, the two new trustees, who had been appointed under the will, should have been reappointed by the Court.

Hatfield Green, for the Petitioners.

HIS LORDSHIP directed the order to be amended by intituling it in the matter of the *Trustee Extension Act*, 1852, as well as of the *Trustee Act*, 1850, and by reappointing the trustees on their "being desirous of retiring."

The order as amended was, so far as is material, in the following form:—

"And it appearing to the satisfaction of the Court that £1000 Consolidated £3 per Cent. Annuities are standing in the names of *R. C.* and *J. G. C.* (the two original trustees), both deceased, in the books of the *Bank of England* upon trust, and that the said *J. G. C.*, who survived the said *R. C.*, has died intestate, and there is not now and there never was any legal personal representative of the said *J. G. C.* deceased, and that the Petitioner *A. E. P.* is beneficially interested in the said annuities; and the Petitioners *J. A. P.* and *T. G. S.* (the two new trustees) being desirous of retiring; This Court doth order that the said Petitioners *J. A. P.* and *T. G. S.* be hereby reappointed trustees of the said will of the said (testator), so far as relates to the said annuities; And this Court doth order that the right to call for a transfer of and to transfer the said £1000 Consolidated £3 per Cent. Annuities, and to receive any dividends now due and to accrue due thereon do vest in the said *J. A. P.* and *T. G. S.*, as such new trustees of the will of the said (testator) deceased."

Solicitors: *Freshfields & Williams; W. W. Wynne.*

(1) *Ante*, p. 304. (2) 4 Ch. D. 143.

In re RICHARDSON.
RICHARDSON *v.* RICHARDSON.

M. R.
1880
June 7.

[1876 R. 40.]

Practice—Administration Action—Insolvent Estate—Creditor obtaining Conduct—Costs.

The rule that a creditor who brings an action on behalf of himself and all other creditors for the administration of an estate which turns out to be insufficient for the payment of debts is entitled to his costs as between solicitor and client, applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin.

THIS was an action for the administration of the personal estate of *John Richardson*, who died intestate in January, 1876. The Plaintiff was his widow and administratrix, and the Defendant was his only child and next of kin.

The usual judgment for administration was obtained on the 26th of February, 1876. The estate proved insufficient for payment of debts.

By an order dated the 21st of January, 1879, the conduct of the action was given to certain persons who had been admitted as creditors under the judgment.

The action now came upon further consideration, the only question being whether the creditors to whom the conduct had been given, as well as the late Plaintiff, the administratrix, were entitled to have their costs taxed as between solicitor and client.

Farwell, for the creditors having conduct, submitted that as the estate was deficient, the fund belonged exclusively to the creditors, and that his clients were therefore entitled to be allowed their costs as between solicitor and client in the same way as if they had been orignally Plaintiffs. He cited *Joseph* v. *Goode* (1): *Thomas* v. *Jones* (2): *Burkitt* v. *Ransom* (3): *Weston* v. *Clowes* (4): *In re Burrell* (5).

B. B. Rogers, for the late Plaintiff, the administratrix.

(1) 23 W. R. 225.
(2) 1 Dr. & Sm. 134.
(3) 2 Coll. C. C. 536.
(4) 15 Sim. 610.
(5) Law Rep. 9 Eq. 443.

M. R.

1880

In re RICHARDSON. RICHARDSON *v.* RICHARDSON.

Morshead, for the Defendant.

JESSEL, M.R.:—

The point is one of importance. The Plaintiff is the administratrix of the intestate in the action, and the Defendant is his sole next of kin. The question is whether the creditors to whom the conduct of the action has been given are entitled to their costs as between solicitor and client.

The action was instituted by the administratrix against the next of kin: there is no objection to that: the action could not have been instituted by her in any other way. After it had been going on for some time, an order was made giving the conduct of the action to certain creditors of the intestate. It turns out that the estate is insolvent, and the question is whether the present applicants, who have the conduct of the action, are not entitled to their costs as between solicitor and client.

Now, on what principle have solicitor and client costs been given to a plaintiff in an administration action? They have been given sometimes to a creditor plaintiff and sometimes to a legatee plaintiff. It seems to me that the principle has been correctly laid down by Vice-Chancellor *Kindersley* in *Thomas* v. *Jones* (1). He there says that where the fund administered is a creditors' fund, it is extremely unreasonable that the general body of creditors should take advantage of the exertions of the particular creditor through whose instrumentality the fund has been recovered without paying him all his costs. But he says that principle does not apply to the case of a residuary legatee who brings an action for the administration of an insolvent estate, because where a residuary legatee comes to the Court, and it turns out that there is no residue, the Court considers he had no occasion to come at all, and therefore when he does come he is not entitled to be allowed his extra costs as between solicitor and client; that is to say, he is not entitled to have those costs paid out of a fund which does not belong to the residuary legatees at all, but to the creditors exclusively.

In *Burkitt* v. *Ransom* (2), which was cited to Vice-Chancellor *Kindersley*, Vice-Chancellor *Knight Bruce* had given costs as be-

(1) 1 Dr. & Sm. 134. (2) 2 Coll. C. C. 536.

tween solicitor and client to a plaintiff in a legatee's suit where there was a deficient fund, but that decision was expressly disapproved of by Vice-Chancellor *Shadwell* in *Weston* v. *Clowes* (1); and in *Wetenhall* v. *Dennis* (2) Lord *Romilly* followed *Weston* v. *Clowes* and *Thomas* v. *Jones* (3).

Then the point came before Vice-Chancellor *James* in *In re Burrell* (4), where the costs of the plaintiff, a residuary legatee, in a suit for administering an insufficient estate, were allowed as between solicitor and client.

Now I think that Vice-Chancellor *James* did not intend to lay down any new general rule. The only authorities that were cited to him were *Burkitt* v. *Ransom* (5) and *Weston* v. *Clowes*, and the Vice-Chancellor seems to have been unaware that there were any other authorities on the subject, or at all events they were not called to his attention. The Vice-Chancellor was evidently dealing only with the particular case before him, and I feel satisfied that he did not intend to interfere with the general rule. Therefore I consider that in a next of kin's suit, or in a legatee's suit, where the estate is insufficient for payment of debts, the plaintiff is not entitled to solicitor and client costs, but that where the plaintiff does not go on with the action and a creditor then comes and takes the conduct of the action on behalf of all the creditors and succeeds in recovering the fund, he is entitled to his costs as between solicitor and client, for in my opinion the same principle applies where the creditor subsequently becomes in effect the plaintiff in the action as where he was originally the plaintiff.

I shall therefore allow Mr. *Farwell's* clients their costs as between solicitor and client.

Solicitors: *Pritchard, Englefield, & Co.; Miller, Smith, & Bell; Pawle & Fearon.*

(1) 15 Sim. 610.
(2) 33 Beav. 285.
(3) 1 Dr. & Sm. 134.
(4) Law Rep. 9 Eq. 443.
(5) 2 Coll. C. C. 536.

M. R.

1880

June 7.

HAWES *v.* HAWES.

[1880 H. 0854.]

Settlement—Construction—Gavelkind Lands—"Right Heirs"—Limitation to "Right Heirs of A., deceased, and B."

92 LD 113
114-5

By a voluntary settlement *A.* and his cousin limited certain gavelkind lands to a relative, *C.*, for life, with remainder to her issue, and for default of such issue "to the use of the right heirs of *E.*, deceased, and *J.*"—who was then living—"the two sisters of the said *A.*, their heirs and assigns as tenants in common for ever":—

Held—the Court declining to read the limitation as a limitation to "the right heirs of *E.*, deceased, and of *J.*"—that *J.* herself took a vested remainder in fee simple in a moiety of the property expectant on the death of *C.* without issue; and, accordingly, that on the death of *C.*, who survived *J.*, and died without issue, the moiety passed to *J.'s* co-heirs in gavelkind.

By a voluntary settlement, dated in 1848, *Sophia Austen* and her cousin *Edward Austen*, in pursuance of a power vested in them under a prior settlement, appointed certain freehold lands of gavelkind tenure in the county of *Kent*, to the use of trustees, upon trust for a relative, *Caroline Matilda Townsend*, for her life, and after her death, to the use of her children and other issue as therein mentioned; "And for default of such issue, to the use of the right heirs of *Elizabeth Townsend*, deceased, and *Jane Hawes*, the two sisters of the said *Edward Austen*, their heirs and assigns as tenants in common for ever."

Elizabeth Townsend was dead at the date of the settlement of 1848: she had one son, who was still living, and was her sole heir both at law and in gavelkind. *Jane Hawes* was living at the date of the settlement: she died in 1850, a widow and intestate, leaving two sons, *Edward Hawes* and *Oscar Hawes*, her sole heirs in gavelkind, *Edward Hawes* being her elder son and heir-at-law.

Edward Hawes died in March, 1872, intestate, having had two sons, the Defendants in this action, they being his sole heirs in gavelkind. *Oscar Hawes* died in April, 1872, intestate, having had two sons, the Plaintiffs in this action, they being his sole heirs in gavelkind.

The Plaintiffs and Defendants were the sole heirs in gavelkind of *Jane Hawes*.

Caroline Matilda Townsend died in August, 1879, without ever having been married.

The Plaintiffs, the two sons of *Oscar Hawes*, claimed by this action a declaration that, in the events which had happened, they and the two Defendants were entitled to one moiety of the property in equal shares as the four co-heirs in gavelkind of *Jane Hawes*.

The Defendants demurred to the statement of claim on the ground that upon the true construction of the settlement no estate either legal or equitable ever became vested in *Jane Hawes* or in her younger son, *Oscar Hawes*.

Chitty, Q.C., and *Cozens-Hardy*, for the demurrer:—

The question is whether the words "right heirs" govern "*Jane Hawes*" as well as "*Elizabeth Townsend*." We submit that the clause should be read as a limitation to "the right heirs of *Elizabeth Townsend* and *Jane Hawes* as tenants in common." In that case, upon the death of *Caroline Matilda Townsend*, the heir-at-law of *Elizabeth Townsend* took one moiety, and *Edward Hawes*, the heir-at-law of *Jane Hawes*, who was then dead, took the other moiety; for under a limitation of gavelkind lands to the "right heirs" of a person, the heir at common law takes, and not the gavelkind heirs: *Garland* v. *Beverley* (1). Then, on the death of *Edward Hawes* intestate, the latter moiety descended to the two Defendants as his heirs in gavelkind.

If, on the other hand, the proper construction of the whole clause is that *Jane Hawes* herself took a vested remainder in fee in the latter moiety expectant on the death of *Caroline Matilda Townsend* with issue—the "right heirs," that is, the heir-at-law, of *Elizabeth Townsend*, taking a vested remainder in fee in the other moiety—then the Plaintiffs and Defendants, as the four gavelkind co-heirs of *Jane Hawes*, now take her moiety in equal shares. We submit, however, that the weight of authority is in favour of the former construction.

(1) 9 Ch. D. 213.

M. R. 1880 HAWES v. HAWES.

[They cited *Lugar* v. *Harman* (1); *Peacock* v. *Stockford* (2); *Mason* v. *Baker* (3); *In re Davies' Will* (4); *Stummvoll* v. *Hales* (5).]

Ince, Q.C., and *W. B. Heath*, for the Plaintiffs, were not called upon.

JESSEL, M.R.:—

I have no doubt whatever as to what is meant.

Two cousins made a voluntary settlement by which, after providing for a certain relative of theirs, *Caroline Matilda Townsend*, and her issue, they provided for the family of a relative, *Elizabeth Townsend*, who was dead, and for another relative named *Jane Hawes*, who was alive; and they did so in these words: "To the use of the right heirs of *Elizabeth Townsend*, deceased, and *Jane Hawes*, the two sisters of the said *Edward Austen*, their heirs and assigns as tenants in common for ever."

Now, what does that mean? Can it mean the "right heirs" of the dead woman, and of "*Jane Hawes*," the living woman? Why should *Jane Hawes* be passed over? Here are two sisters. Why should *Jane Hawes* take nothing, when the other persons to take can take only as right heirs of *Elizabeth Townsend*. Surely the right construction is that the right heirs of *Elizabeth Townsend* on the one hand, and that *Jane Hawes* on the other hand, take in equal shares. One does not want to go far afield to see that that is good grammar, and the real meaning of the clause. The other construction would give an absurd result. First of all you would pass over altogether *Jane Hawes*, who is one of the sisters, and direct the right heirs of *Elizabeth Townsend* to take as tenants in common, although *Jane Hawes* is alive; so that they would take as tenants in common with nobody on that assumption; whereas on the other hand they must take as tenants in common with *Jane Hawes*, or with persons deriving title under her. That is one difficulty in the way of the Defendants' construction.

Then there is another difficulty in the way of the Defendants. This deed deals with real estate, and there are two rules of law

(1) 1 Cox, 250.
(2) 3 D. M. & G. 73.
(3) 2 K. & J. 567.
(4) 29 Beav. 93.
(5) 34 Beav. 124.

applicable to real estate. Where there is a doubt as to the construction the rule of law is, first of all, to prefer a remainder to a springing use; and, secondly, to prefer a vested remainder to a contingent remainder. Both those rules have been referred to, and if necessary I should come to the same conclusion on either of them. To read the clause as the Defendants read it, *Jane Hawes* being a living person, a gift to her heirs must be both a springing use and contingent also; whereas upon the other construction there is a pure vested remainder in fee in *Jane Hawes* expectant on the death of *Caroline Matilda Townsend* without issue.

As is usual, a number of cases have been referred to. I must say, in the first place, that those cases are not cases with regard to real estate, and, consequently, they are not of the same value as if they had been cases with regard to real estate, because, as I have often said, in real estate law it is too late to go back to principle, for the law has been settled by decided cases. In the cases referred to, which are cases of wills, not deeds, the wills are all personal estate. But I must say that as far as those authorities go they are in favour of the construction which I have adopted.

The case of *Lugar* v. *Harman* (1) is very precise. There it was a gift to "all and every the child and children of my late cousin *Edward Lugar* and my cousin *Philip Fearis* and their lawful representatives." Now that is a much stronger case in favour of the Defendants than the one before me, for a gift to "all and every the child or children" is totally different from a gift "to the use of the right heirs." Here it is "to the use of the right heirs:" in the case of *Lugar* v. *Harman* it was a gift to "all and every the child and children" of the person named, which is certainly more favourable to the Defendants. There it was held that you could not put in the word "of," and that you must understand the words as they stand in their plain grammatical sense.

The case of *Peacock* v. *Stockford* (2) is a very strong case. In that case there was the word "of," and there Lord Justice *Turner* says, "Had the disposition been in the latter form"—that is, omitting the word "of"—"the surviving nieces must, we think,

(1) 1 Cox, 250.

(2) 3 D. M. & G. 73.

M. R. 1880 HAWES v. HAWES.

have been held entitled, according to the decisions in *Lugar* v. *Harman* (1) and what is said in *Doe* v. *Joinville* (2)." I cannot find that it was so decided in *Doe* v. *Joinville*, but it certainly was so decided in *Lugar* v. *Harman*. Therefore that is a strong decision to shew that the omission of the word "of" would have made all the difference.

Then there is a decision of Vice-Chancellor *Wood* in the case of *Mason* v. *Baker* (3). I do not profess to say that I quite follow his observations, but the Vice-Chancellor says this: "In strict criticism a good deal may be said in favour of the view that, if the children of *Mary Mason* were intended, the idiom of our language requires that the word 'of' should be supplied before the words 'my sister *Mary Mason*'; and that this is more necessary than it would be to insert the word 'to' in the same place, if the other construction suggested be the true one." Then he says (4), "I can scarcely say that it is idiomatic English to use the expression, 'I give to the children of *A.* and *B.* in equal shares,' meaning to give to the children of one and of the other of them;" and so forth.

All those cases, therefore, are against the Defendants.

Then there are two more cases: I need not read them. One is the case of *In re Davies' Will* (5), before the late Master of the Rolls; and the other is the case of *Stummvoll* v. *Hales* (6), also before his Lordship. All I can say is, that those cases may be set off one against the other. The case of *In re Davies' Will* certainly looks favourable to the demurring parties, but there are no reasons given. *Stummvoll* v. *Hales* is decidedly against them, and there are reasons given in which his Lordship recognises *Lugar* v. *Harman* on the whole as good law; but at all events three cases remain undisturbed as far as they go, and all those cases, although I do not say they are decisive of the present, are against the demurrer, which I therefore overrule.

Solicitors: *J. Penfold; Sole & Co.*, agents for *Cripps & Son, Tunbridge Wells.*

(1) 1 Cox, 250.
(2) 3 East, 172.
(3) 2 K. & J. 567.
(4) 2 K. & J. 569, 570.
(5) 29 Beav. 93.
(6) 34 Beav. 124.

In re GOODMAN'S TRUSTS.

M. R.
1880
June 12.

Statute of Distributions—Intestacy—Next of Kin—"Children"—Legitimacy—Domicile—Foreign Law.

The word "children" in the *Statute of Distributions* (22 & 23 Car. 2, c. 10) means children according to the English law, and therefore does not include children who, though legitimate according to the law of another country, are illegitimate according to the English law.

On the death of an intestate domiciled in *England*, a child of a deceased brother of the intestate, legitimate according to the law of *Holland*, where she was born, and legitimated on a subsequent marriage of her parents, but illegitimate according to the English law, claimed a share of the intestate's personal estate as one of her next of kin under the *Statute of Distributions*:—

Held, that the claimant, being illegitimate according to the English law, was excluded.

Goodman v. *Goodman* (1) and *Boyes* v. *Bedale* (2) considered.

RACHEL GOODMAN, spinster, who died in 1878, domiciled in *England*, by her will, dated in 1862, bequeathed one-third of her residuary estate to her niece absolutely. The legacy, however, lapsed through the death of the niece in the lifetime of the testatrix, so that on the death of the latter the question arose who were the persons entitled to the legacy as her next of kin.

It appeared that the testatrix had six brothers and sisters, all of whom predeceased her. None of them left any children surviving her except two of the brothers, of whom one, *Isaac Goodman*, left four children surviving her.

The family of the other brother, *Leyon Goodman*, formed the subject of a special inquiry directed in a suit of *Goodman* v. *Goodman* (1)—which was a suit for the administration of the estate of *Henry Goodman*, the father of the testatrix—and in answer to such inquiry the Chief Clerk certified to the following effect: that *Leyon Goodman* had three children, born respectively in 1815, 1818, and 1820, in *London*, by one *Charlotte Smith*, not his wife; that in 1820 he left *England* with the intention of permanently residing abroad, and went to *Amsterdam*, whither he was followed by *Charlotte Smith* and the three children, and where he resided

(1) 3 Giff. 643. (2) 1 H. & M. 798.

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till 1826, and that from that date till his death in 1832, he resided at *Brussels:* that while at *Amsterdam* he had another child by *Charlotte Smith, Hannah,* born in 1821, who afterwards married *Jean Joseph Pieret:* that in June, 1822, at *Amsterdam,* he married *Charlotte Smith,* and that by the act or register of marriage it was declared that the parents intended to legitimate all the children before mentioned: that after the marriage they had a fifth child, *Mary,* born at *Amsterdam,* who afterwards married *Denis Denis:* that *Charlotte Goodman,* the widow, was dead, and that the said *Hannah Pieret* and her said husband were still living at *Brussels.*

The other evidence in the suit shewing that the four first children of *Leyon Goodman* were legitimate according to the law of *Holland* will be found stated in the report of *Goodman* v. *Goodman* (1).

By an order made by Vice-Chancellor *Stuart* in *Goodman* v. *Goodman* on the 22nd of July, 1862, it was declared that *Hannah Pieret* and *Mary Denis* were entitled in equal moieties to their father's share in *Henry Goodman's* estate.

Doubts having arisen in consequence of Vice-Chancellor *Wood's* decision in *Boyes* v. *Bedale* (2), pronounced subsequently to the date of the said order of Vice-Chancellor *Stuart* in *Goodman* v. *Goodman*—whether *Hannah Pieret,* who was still living, was entitled to any share of the lapsed legacy bequeathed by *Rachel Goodman's* will—the trustees of the will paid the sum of £15,736 14*s.* 3*d.* cash, being the amount of the legacy, into Court under the *Trustee Relief Act.*

A petition was now presented by *Mary Denis,* her husband, and the surviving trustee of her marriage settlement, praying that the fund might be divided into equal fifths, and that one of such fifths might be paid to the petitioning trustee, and that the remaining four-fifths might be paid to the Respondents, the four children of *Isaac Goodman,* respectively, or otherwise dealt with as the Court should think fit.

The question thus raised was whether the fund was not divisible into sixths, instead of fifths, so as to let in *Hannah Pieret* as one of the next of kin of the testatrix *Rachel Goodman.*

(1) 3 Giff. 643. (2) 1 H. & M. 798.

D. L. Alexander, for the Petitioners :—

I submit that on the death of an intestate domiciled in *England* no one can participate in his estate who is not his next of kin according to the English law: *Statute of Distributions*, 22 & 23 Car. 2, c. 10.

The only authority which can be cited against me is that of *Goodman* v. *Goodman* (1), where Vice-Chancellor *Stuart* held that under a bequest by *Henry Goodman*, a domiciled Englishman, to *Leyon Goodman's* "children," *Hannah Pieret* was entitled to participate: but the Vice-Chancellor gives no reasons for his decision, and in fact the question whether a child who was illegitimate according to the law of *England* came within the term "children" in the will of a domiciled Englishman was not argued.

On the other hand, in *Boyes* v. *Bedale* (2) that question was fully argued before Vice-Chancellor *Wood*, whose decision was directly contrary to that of Vice-Chancellor *Stuart*, and in *In re Wilson's Trusts* (3)—affirmed by the House of Lords in *Shaw* v. *Gould* (4)—Vice-Chancellor *Kindersley* expressly followed *Boyes* v. *Bedale*.

It is now well settled that the law of the domicile of a deceased person governs the succession to his personal property: *Doglioni* v. *Crispin* (5); consequently *Hannah Pieret*, being illegitimate according to the English law, is not entitled to any share of the property of *Rachel Goodman*, who was domiciled in *England*.

[He was stopped by the Court.]

Chitty, Q.C., and *Speed*, for the Respondent, *Hannah Pieret* :—

We rely on the decision in *Goodman* v. *Goodman*. It is almost impossible to suppose that the question was not raised or at least was not present to the mind of the Court.

[They commented on the cases above cited, and also referred to *Udny* v. *Udny* (6).]

Brabant, for the Respondents, the trustees of *Rachel Goodman's* will.

(1) 3 Giff. 643. 8 Jur. N. S. 574
(2) 1 H. & M. 798. 10 Jur. N. S. 196
(3) Law Rep. 1 Eq. 247.
(4) Law Rep. 3 H. L. 55, 70, 80.
(5) Ibid. 1 H. L. 301.
(6) Ibid. 1 H. L., Sc. 441.

M. R. JESSEL, M.R.:—

1880

In re GOODMAN'S TRUSTS.

First of all, as regards the case of *Goodman* v. *Goodman* (1), I entirely agree with what Vice-Chancellor *Kindersley* said in *In re Wilson's Trusts* (2), that Vice-Chancellor *Stuart* never decided this question. What he decided and what he intended to decide was that the domicile of the father was in *Holland* at the time of the procreation of his child *Hannah*. So much for *Goodman* v. *Goodman*.

Then, as regards the case of *Boyes* v. *Bedale* (3), Vice-Chancellor *Wood* there decided two points; the first was that, in construing the will of a domiciled Englishman the "children" of a person not domiciled in *England* must mean legal children according to the English law, as distinguished from children born before marriage, who were not legitimate according to the English law. But the Vice-Chancellor decided more than that. This is what he said (4): "I take it that the language of the *Statute of Distributions* would be dealt with in the same way. If an intestate dies domiciled in *England* the division of his property is governed throughout by English law, and no person could take by representation under that statute unless legitimate by the law of *England*."

That is, no doubt, only a *dictum*, but it is a *dictum* which, coming from such a Judge, is entitled to very great respect. If I had any doubt upon the subject in this case, I should follow the *dictum*; but in fact I feel no doubt whatever. The words of the 7th section of the *Statute of Distributions* (22 & 23 Car. 2, c. 10), under which Madame *Pieret* must come in order to claim as next of kin, are "brothers' and sisters' children." When an intestate dies without children, and you proceed to ascertain who are his next of kin, you must not carry the representation beyond his brothers' and sisters' children; consequently this lady must prove herself to be a child of a brother or sister of the intestate in this case in order to take at all; and the question is whether the word "children" in the statute does not mean exactly what Vice-Chancellor *Wood* said as regards the word "children" in a will, that is, children according to the law of *England*. I think it does.

(1) 3 Giff. 643.
(2) Law Rep. 1 Eq. 247.
(3) 1 H. & M. 798.
(4) Ibid. 805.

Then I have, in addition to that, the authority of Vice-Chancellor *Kindersley* in *In re Wilson's Trusts* (1), where he entirely agreed with *Boyes* v. *Bedale* (2), and held that the word "children" in the will of a domiciled Englishman meant children according to the English law, and not children according to the Scotch law. He says (3), "Now, the will being a will made in *England*, by an Englishman domiciled in *England*, must be construed according to the law of *England*. Every term in it must receive that interpretation which belongs to it according to English law. What is the interpretation which the law of *England* gives to the term "children"? Undoubtedly children lawfully begotten *ex justis nuptiis procreatos;* unless, indeed, there be something in the context which satisfies the Court that the testator meant to use the expression in a different sense."

Therefore the Vice-Chancellor quite agrees that in the case of a will it must be so. Then he afterwards refers to *Boyes* v. *Bedale*, and says, "I do not hesitate to follow that decision." So that decision agrees with *Boyes* v. *Bedale*.

I think, if it is agreed that those cases are decided rightly in the case of a will of a domiciled Englishman, the term "children" in the statute, wherever it occurs, must mean children according to the English law.

As regards the actual decision in *Goodman* v. *Goodman* (4), I have already dealt with it, but I may add that the declaration by Vice-Chancellor *Stuart* of Madame *Pieret's* legitimacy in that particular case cannot decide the question of her legitimacy for all purposes. In that case it seems that the opinions of Dutch advocates were taken, and that according to all those opinions the brothers and sisters of Madame *Pieret* and Madame *Denis* were legitimate according to the Dutch law. I therefore do not at present see on what ground Madame *Pieret* should have been let in to the exclusion of all her brothers and sisters other than Madame *Denis*.

Solicitors: *Capron, Dalton, Hitchins, & Brabant; Wild, Browne, & Wild.*

(1) Law Rep. 1 Eq. 247.
(2) 1 H. & M. 798. 10 Jur. N.S. 196
(3) Law Rep. 1 Eq. 263.
(4) 3 Giff. 643. 8 Jur. N.S. 554

M. R.
1880
June 26.

In re ARTIZANS' AND LABOURERS' DWELLINGS IMPROVEMENT ACT, 1875. *Ex parte* JONES.

Practice—Public Company—Local Authority—Purchase of Land—Payment out of Court—Petition—Costs—Incumbrancers—Service—Lands Clauses Consolidation Act, 1845, *s.* 80—*Artizans' and Labourers' Dwellings Improvement Act*, 1875, *Sched., ss.* 24, 25.

Where purchase-money has been paid into Court under the *Lands Clauses Consolidation Act*, 1845, or the *Artizans' and Labourers' Dwellings Improvement Act*, 1875, and a petition is presented for payment out either to or with the consent of incumbrancers, the only costs which the company or local authority (as the case may be) can be required to pay, in addition to the Petitioner's costs, are the sum of 42*s.* for the incumbrancers' costs, and a further sum sufficient to cover the costs of an affidavit of service of the petition upon the incumbrancers.

In re Halstead United Charities (1) followed.

THIS was a petition by a mortgagor of certain freehold premises which had been taken by the Metropolitan Board of Works under the *Artizans' and Labourers' Dwellings Improvement Act*, 1875, and the purchase-money for which had been paid into Court under sects. 24 and 25 of the schedule to the Act, praying for payment out of the purchase-money to the mortgagees on account of their mortgage debt: also that all the costs of and incidental to the petition might be paid by the board.

The mortgagees were served with and made Respondents to the petition.

Crossley, Q.C., and *H. M. R. Pope*, for the Petitioners.

Solomon, for the mortgagees.

F. Pownall, for the Metropolitan Board of Works, submitted that the mortgagees ought not to have their costs of appearance, and that the utmost the Court would allow against the board for the mortgagees' costs was 42*s.*, and a further sum for the costs of the affidavit of service, as in cases under sect. 80 of the *Lands*

(1) Law Rep. 20 Eq. 48.

Clauses Consolidation Act, 1845: *Seton* on Decrees (1); Additional Rules of Court (Special Allowances), August, 1875, rule 17.

JESSEL, M.R.:—

Looking at the practice under the *Lands Clauses Act*, which must govern the practice under the *Artizans' Dwellings Act*, we find that in *Re Hatfield's Estate* (2) it was held, upon a petition for payment out to a mortgagee, that the company was not liable to pay any of the mortgagee's costs at all. But that is not the rule now, for it is only fair that the mortgagees should have some costs. Accordingly, in *In re Gore Langton's Estates* (3), the Lords Justices said that on a petition simply for reinvestment in land, where there were incumbrancers whose rights were not affected by the petition, the proper course was to serve them with a copy of the petition, and pay them 40*s.* for their costs, but no more.

Then, in *In re Halstead United Charities* (4), Vice-Chancellor *Malins* held that the rule laid down in *In re Gore Langton's Estates* applied to the case of a petition for the payment out of Court with the consent of the incumbrancers; and he also held that the petitioners were entitled to add to their costs of the petition, in addition to the 40*s.*, a sum sufficient to cover the costs of an affidavit of service.

That decision of Vice-Chancellor *Malins* seems to me to be a very reasonable and proper one, and clearly, in substance, follows the decision of the Lords Justices. I shall therefore follow Vice-Chancellor *Malins'* decision, and order the board to pay, in addition to the costs of the Petitioners, 42*s.* for the mortgagees' costs, and the costs of an affidavit of service on the mortgagees.

Solicitors: *S. Betteley & Co.*; *Solicitor to Metropolitan Board of Works.*

(1) 4th Ed. p. 1445.
(2) 29 Beav. 370; 32 Beav. 252.
(3) Law Rep. 10 Ch. 328.
(4) Ibid. 20 Eq. 48.

M. R.

1880

July 3.

In re BOYD'S SETTLED ESTATES.

Trustees—Investment—"Real Securities"—Long Leaseholds.

As a general rule long terms of years do not answer the description of "real securities," within the meaning of a power for trustees to lend on mortgage of "real securities."

THIS was a petition by the tenant for life, the first tenant in tail in remainder and the trustees under the will of *Walter Boyd*, who died in 1837, to obtain the sanction of the Court to certain proposed investments of purchase-moneys in Court arising from the sale of the *Plaistow Lodge* estate which had been devised by the will in strict settlement, and sold under an order of the Court made in 1870 under the old *Settled Estates Act* (19 & 20 Vict. c. 120).

It was proposed that £6000, part of the fund in Court, should be invested on the security of a portions term of 300 years created by the will of the late Earl of *Lonsdale* out of large estates in the county of *Westmoreland*, and the petition asked (amongst other things) that the usual inquiry might be directed as to the title to the term, and that if such title should be approved a proper mortgage should be executed for the £6000.

Chitty, Q.C., and *Wolstenholme*, for the Petitioners:—

This money may be invested as "cash under the control of the Court": *Settled Estates Act*, 1877, s. 36; but our difficulty is that such cash may be invested only "upon mortgage of freehold and copyhold estates," not "real estates": Ord. I., Feb. 1861; *Morg.* Chanc. (1).]

[JESSEL, M.R.:—Even if the order had said "real estates," that would not have helped you.]

In *In re Chennell* (2) your Lordship is reported to have said that such an investment "would be justified if the leaseholds were held at a peppercorn rent for a long term, without covenants and without impeachment for waste, a mortgage of which was held by Vice-Chancellor *Shadwell*, in an unreported case, to be a proper security for trust money."

(1) 5th Ed. p. 260. (2) 8 Ch. D. 492, 507.

R. O. Turner, for an incumbrancer, consenting.

M. R.
1880
In re Boyd's Settled Estates.

Jessel, M.R.:—

There was another case upon the subject before Vice-Chancellor *Shadwell* which I recollect very well, for I was counsel in it, and it was one of my earliest cases at the Bar. It was argued at great length, on the one side by the late Mr. *Joseph Humphry*, and on the other by the late Lord *Westbury*, then Mr. *Bethell*, and myself. As the point was one of considerable importance it is singular that it is not reported anywhere. The name of the case was *In re The Spurn Lights;* some land had been taken under the *Merchant Shipping Act*, 1854 (sect. 404), for the purpose of erecting a light-house and the money was paid into Court under that Act and the *Lands Clauses Consolidation Act*, 1845, which by that Act (sect. 413) is made applicable to land so taken. The matter then came before Vice-Chancellor *Shadwell* upon a petition for investment in leaseholds renewable for ever, when he held that such an investment was not a proper security for trust money.

Upon the general question whether trustees having power to invest on real securities may invest on long terms of years, the law is thus stated by Mr. *Lewin: Lewin* on Trusts (1): "Where there is a power to lend on mortgage of real estates generally, there may be no objection on principle to an investment on long terms of years at a peppercorn rent, which beneficially are equal to freeholds. But it remains to be decided whether technically long terms of years answer the description of real securities."

Although the question does not directly arise in the present case, I desire to express my opinion that, as a general rule, long terms of years do not answer the description of "real securities."

In the present case, the investment must be, according to the General Order, "upon mortgage of freehold and copyhold estates;" the proposed investment in a mortgage of a term of years is, therefore, clearly not within the Order, and accordingly I must decline to sanction it.

Solicitors: *Domville, Lawrence, Graham, & Long.*

(1) 7th Ed. p. 300.

M. R.
1880
July 8.

In re CITY OF GLASGOW BANK.

Practice—Winding-up—Calls—Scotch Order—Companies Act, 1862, *ss.* 122, 123.

Where, in the winding-up of a company by the Court of Session in *Scotland*, an order for a call has been made by that Court, and it has become necessary to enforce the call against contributories resident in *England*, the order must be made an order of the Chancery Division in *England*.

In re Hollyford Copper Mining Company (1) followed.

THE *City of Glasgow Bank* being in liquidation under a winding-up order made by the Court of Session in *Scotland*, an order for a call was made by that Court.

Some of the contributories who were resident in *England* having failed to pay the call within the time limited by the order, the liquidators now applied that the order might be made an order of the Chancery Division, for the purpose of enforcing it against those contributories.

Decimus Sturges, for the liquidators, referred to sects. 122 and 123 of the *Companies Act*, 1862, as to enforcing in *England* an order made in a winding-up by the Scotch Court, and cited *In re Hollyford Copper Mining Company* (1), before Lord Justice *Giffard*, as an authority in support of the application. He stated that the Master of the Rolls in *Ireland* had, in *In re Hercules Insurance Company* (2)—where a winding-up order had been made in *England*—declined to adopt the view of Lord Justice *Giffard*, considering that, under the 123rd section, it was sufficient to produce an office copy of the order to the proper office of the Court of Chancery in *Ireland* without making it an order of that Court.

JESSEL, M.R.:—

I am bound by the decision of the Lord Justice, although the Irish Master of the Rolls was not. I have before made orders in Chambers such as that now asked.

I therefore direct that the order for a call be made an order of the Chancery Division.

Solicitors: *Clarkes, Rawlins, & Clarke.*

(1) Law Rep. 5 Ch. 93. (2) 6 Ir. Eq. Rep. 207.

SYKES *v.* SCHOFIELD.

M. R.
1880
July 17.

[1880 S. 181.]

Partition Action—Partition Act, 1868, *s.* 3—*Sale at Request of Persons entitled to less than a Moiety—Form of Judgment—District Registry—Order for Sale.*

Form of judgment in an action under the Partition Acts where the parties to the action are persons entitled to less than a moiety of the property and request a sale.

Where such an action is intituled in the Chancery Division and a District Registry, the usual inquiries may be made in the District Registry, but the application for a sale should be made in the Chambers of the Judge of the Chancery Division to whom the action is attached.

THIS was an action intituled in the Chancery Division and the *Huddersfield* District Registry, for a sale under the Partition Acts of certain freehold land and buildings at *Crosland Moor*, in the county of *York*. The Plaintiff was the owner of two undivided thirty-fifths of the property, and the Defendant was the owner of one-fourth of five undivided thirty-fifths. The owners of the remaining thirty-fifths were very numerous, and were not parties to the action.

The Plaintiff and Defendant both desiring a sale, the action now came on upon motion for judgment as a short cause.

The minutes, after directing the usual inquiries to be made in the District Registry, including an inquiry who were the persons interested, and whether they were parties to the action, proposed an order "that any of the persons interested are to be at liberty, after it has been certified that all persons who are not parties to this action and who ought to be served with notice of this judgment have been so served, to apply at Chambers for an order for the sale of the said hereditaments."

The form of judgment given in *Seton* on Decrees (1) for the case of a sale under the 3rd section of the *Partition Act*, 1868, at the request of persons entitled, as the Plaintiff and Defendant were in the present instance, to less than a moiety, directs a sale

(1) 4th Ed. p. 1005, Form 3.

M. R. 1880 SYKES v. SCHOFIELD.

"in case it shall be certified that all the persons interested are parties to this action." It was, however, submitted that in such a case as the present, where the Plaintiff and Defendant were clearly not the only parties interested, this part of the form should be omitted as being superfluous and inapplicable.

G. St. Leger Daniels, for the Plaintiff.

B. Eyre, for the Defendant.

JESSEL, M.R., said the minutes were in the right form, and gave judgment accordingly.

In reply to a question whether an order for sale could be made in the District Registry,

HIS LORDSHIP said that the order should be made on an application in Chambers as provided by the minutes.

Solicitors: *C. Fitch*, agent for *E. Sykes & Son, Huddersfield; J. W. Sykes*, agent for *J. Bottomley, Huddersfield.*

M. R. 1880 *July* 24.

RIMINGTON *v.* HARTLEY.

[1880 R. 0459.]

Practice — Partition Action — Infant — Request for Sale — Next Friend — "Guardian" — Partition Act, 1876, s. 6.

In a partition action the request for sale on the part of an infant (*Partition Act*, 1876, s. 6) may be made by his next friend or guardian *ad litem*, as being the "person authorized to act" on his behalf in the action: the word "guardian" in the section meaning guardian *ad litem*.

Platt v. *Platt* (1) not followed.

The Court will not comply with a request for sale made on behalf of an infant under the above section unless it is satisfied that a sale is for the benefit of the infant.

THIS was an action under the Partition Acts for a sale of certain freehold lands in the parish of *Penrith, Cumberland*, the Plaintiffs

(1) 28 W. R. 533.

(some of whom were infants) and the Defendants being persons interested in upwards of a moiety thereof.

The action now came on as a short cause upon motion for judgment on prepared minutes, the adult Plaintiffs and the Defendants, and the infant Plaintiffs, by their brother and next friend, "requesting a sale" and distribution of the proceeds instead of partition.

Chitty, Q.C., and *Shebbeare*, for the Plaintiffs.

Bagshawe, Q.C., and *Oswald*, for two of the Defendants, who were trustees, submitted to the Court, whether, having regard to the recent decision of Vice-Chancellor *Malins* in *Platt* v. *Platt* (1), the request for sale to be made on behalf of an infant under sect. 6 of the *Partition Act*, 1876, should not be made by the infants' guardian, and not, as proposed by the minutes in the present case, by the next friend.

Ince, Q.C., and *Everitt*, for the other Defendants.

JESSEL, M.R. :—

It appears to me that the Act is intended to allow an infant to make his request for a sale by the person who is authorized to act on his behalf. First, what are the words of the Act? If we look at the 6th section we find that a request for sale may be made "on the part of a married woman, infant, person of unsound mind, or person under any other disability"—by whom? By the "next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability."

If the section is to be read *reddendo singula singulis*, as stated by the learned Vice-Chancellor in *Platt* v. *Platt*, then the words "person of unsound mind" do not include, as they ought to do, a person of unsound mind not so found, for the request is to be made only by the "committee in lunacy." Now, how does a person under disability sue, or how is he sued? By his next friend or guardian *ad litem*. If he is an infant, who is the "person

(1) 28 W. R. 533; W.N. (80) 58.

M. R. 1880 RIMINGTON v. HARTLEY.

authorized to act" on his behalf? It must be the person who is authorized to act on his behalf in the action, that is, his next friend or guardian *ad litem*. The request must be made by a person before the Court in the action; but, according to the Vice-Chancellor's view, it may be made by a person who is not before the Court. Take the case of an infant having a living father. He can have no guardian to act on his behalf in an action but a guardian *ad litem*. But in this case, which is probably the case in nine-tenths of the actions under the Partition Acts, if, as the Vice-Chancellor says, the word "guardian" in the section means only a testamentary guardian or a guardian appointed by the Court, then the father, who is the guardian by law, is omitted altogether.

What does the word "guardian," standing alone, generally mean? I suppose guardian of the person. An infant may have several guardians: he may have a guardian of the person, or a guardian in socage, or in gavelkind, or, if he has a copyhold estate, a guardian according to the custom of the manor. But I suppose "guardian" of an infant means guardian of the person. However, as I said before, if the word "guardian" in the section does not mean a guardian *ad litem*, you cannot restrict it as the Vice-Chancellor restricts it; for it could not be supposed that the Act meant to exclude the commonest case of all, that of an infant having a living father.

In my opinion the section means that the request is to be made by the person authorized in the action to act on behalf of the person under disability, that is, the next friend or guardian *ad litem*. That makes the section complete.

Then the Legislature may have thought that, as the infant himself cannot act, some check should be imposed upon the request, for the section goes on to say that the Court shall not be bound to comply with any such request "unless it appear that the sale .... will be for his benefit." That is the control which the Act gives to the Court as a check upon the request. The Court is bound to see that the sale is for the benefit of the infant. That obviously means that the Court is not bound to comply with the request unless it is satisfied that the sale is for the benefit of the infant.

Therefore I will direct a sale in this case if I am satisfied that it is for the benefit of the infants.

Evidence then having been produced shewing that a sale would be more advantageous to all parties, including the infants, than a partition,

HIS LORDSHIP gave judgment according to the minutes.

Solicitors: *Johnston & Harrison*, agents for *Little & Lamonby, Penrith.*

V.-C. H.
1880
April 24;
May 1, 8.

In re GOVERNMENT SECURITY FIRE INSURANCE COMPANY.

MUDFORD'S CLAIM.

Advertisements for Company—Agreement to give fully paid-up Shares—Non-registration under sect. 25 *of Companies Act,* 1867*—Contributory Negligence—Voluntary Winding-up — Right of Action — Claim for Damages allowed.*

A company agreed to give *M.*, a newspaper proprietor, fully paid-up shares in discharge of his account rendered, for advertisements. The contract was not registered, but shares were allotted to *M.* purporting to be fully paid up, and the liquidator in a voluntary liquidation placed *M.* on the list of contributories for the shares allotted to him. Shares had been taken at par after the allotments to *M.*:—

Held, that *M.* had a right to prove for damages to the amount of the calls made or which might be made upon him, and that the fact that the contract which required registration was in his hands was no bar to the claim.

THIS case was heard as an adjourned summons upon an agreed statement of facts. The company was incorporated in November, 1875, under the *Companies Acts*, 1862 and 1867, for the purpose of carrying on the business of fire insurance in all its branches in the *United Kingdom* and the colonies. The proposed capital was £258,645 in 51,729 shares of £5 each. By article 56 of the articles of association, the directors were empowered to borrow moneys and to enter into contracts for the company; and by article 9 it was provided that in all cases in which the directors should agree to give paid-up shares in payment or as a consideration for any property, or for work done for the company, or for any other purpose, such shares should upon delivery thereof be treated and considered as paid-up shares for the amount represented to be paid up in respect of the same at the time of the issue thereof, and no holder of such paid-up shares should in respect of such shares be liable to any call in respect of the amount represented to be paid up thereon at the time of the issue thereof. The company invited newspaper proprietors to advertise their prospectus and other notices on condition that they would agree to accept payment of their accounts in fully paid-up shares.

F. W. J. Mudford, the proprietor of the *Kentish Observer*, in 1876 accepted the invitation, and it was in writing agreed between him and the company that he should insert advertisements of the company in his newspaper on the terms of being paid his usual charges for them in fully paid-up shares, and in pursuance of the agreement he, between the 9th of September, 1876, and the 28th of February, 1877, inserted advertisements in his paper for the company, for which charges amounting to £50 were made. In consideration of such insertions, and in discharge of the account rendered, the company allotted him ten shares, and on the 7th of September, 1876, sent to him certificates for five shares; on the 13th of November, 1876, certificates for four shares, and on the 4th of December, 1876, a certificate for one share. All of them stated that the shares were fully paid up, and on those dates he was duly registered as the holder of such shares. No contract in writing as to the advertisements or the issue of the fully paid-up shares in payment thereof was filed with the Registrar of Joint Stock Companies at or before the issue of any such shares. *Mudford* was not aware until after the commencement of the winding-up (voluntary under a resolution passed by the company on the 8th of November, 1877) that no contract had been filed, but he always believed that the shares were fully paid up, and he would not have accepted them if he had been aware that they were not in fact fully paid up, as had been agreed upon between him and the company. Shares were allotted to the public at par subsequently to the issue of the certificates to *Mudford*.

In accordance with the decision in *White's Case* (in the winding-up of the same company) (1), *Mudford* was placed on the list of contributories for ten shares of £5 each, and he then claimed to prove in the winding-up for damages for breach of the agreement by the company in respect of fully paid-up shares not having been delivered to him, and the question was whether the liquidator should admit the proof.

Eddis, Q.C., and *Plummer*, for *Mudford*:—

The contract on the part of the company was to give for the

(1) 12 Ch. D. 511.

V.-C. H. 1880 *In re* Government Security Fire Insurance Company. Mudford's Claim.

work done fully paid-up shares, and there was to be no liability in respect of them, but there is a liability, therefore there has been a breach of the contract. Before the winding-up the right of *Mudford* was to be taken off the register, the shares allotted could have been cancelled, and new shares could have been issued after the registration of the contract. The mistake could have been rectified: *Ex parte Shaw* (1); *Ex parte Thomas* (2); *Hartley's Case* (3). The contract not having been registered, and it being now, in consequence of the winding-up, impossible to carry it into effect, damages for the loss sustained can be proved for: *Claim of Ebbw Vale Company* (4), and the measure of the damages will be the full nominal value of the shares at the time of allotment. The evidence shews that some shares were subscribed for by the public at their full value of £5, that was therefore their marketable value, after *Mudford* received his last certificate, and he now claims to prove for damages to the extent of the sum which he may be required to pay in respect of the shares. He has a right to be indemnified against all liability.

Hastings, Q.C., and *Methold*, for the liquidator:—

There has been no breach of contract for which the company would be liable in an action. The shares were issued and taken under a common mistake of law. There was no misrepresentation, and no fraud in not registering the contract: *Blythe's Case* (5); *Eaglesfield* v. *Marquis of Londonderry* (6); *Beattie* v. *Lord Ebury* (7). *Mudford* was himself negligent in not obtaining registration, the contract being in his hands: *Richardson* v. *North Eastern Railway Company* (8); *Hill* v. *Warren* (9); and cannot therefore claim to prove for damages. But, assuming that there has been a breach of contract for which the company is liable, what is the measure of damages? It is submitted that in cases under the 165th section of the *Companies Act*, 1862, it is the highest known value: *McKay's Case* (10); but here the measure

(1) Law Rep. 18 Eq. 16.
(2) Ibid. 18 Eq. 17, n.
(3) Ibid. 18 Eq. 542; Ibid. 10 Ch. 157.
(4) Ibid. 8 Eq. 14.
(5) 4 Ch. D. 140.
(6) Ibid. 693.
(7) Law Rep. 7 H. L. 102.
(8) Ibid. 7 C. P. 75.
(9) 2 Stark. N. P. 377.
(10) 2 Ch. D. 1.

of damages will be the value of the shares at the date of the breach, as to which, if the proof be admitted at all, there should be an inquiry.

[The cases of *In re Bahia and San Francisco Railway Company* (1), *Blyth* v. *Carpenter* (2), *Andress's Case* (3), *Hart* v. *Frontino and Bolivia South American Gold Mining Company* (4), *De Ruvigne's Case* (5) were also cited.]

Eddis, in reply.

HALL, V.C.:—

It has not been contended before me that the contract was altogether void. In *White's Case* (6), both before me and in the Court of Appeal, the validity of the contract was admitted by the liquidator's counsel; and I see no reason to doubt the validity of the contract, subject, however, to the operation of the 25th section of the *Companies Act* of 1867, and I refer to the observations of Lord Justice *Mellish* in *Black & Co.'s Case* (7). The argument before me was that the company was not liable by reason of omission on their part to register the contract before the issue of the shares; and it was also argued that the contract being, as it was, in the hands of Mr. *Mudford*, there was contributory negligence on his part in not having registered it. It was also argued that the loss to Mr. *Mudford* was attributable to the parties having assumed, as it was said, that registration was unnecessary in cases like the present, it being said that they erroneously considered the case would be brought within *Spargo's Case* (8). It appears to me that those several arguments and contentions cannot prevail. The company expressly agreed to give fully paid-up shares, of course meaning thereby valid shares fully paid up. I hold that that agreement has clearly been broken by the company by their not so doing.

The suggestion as to contributory negligence cannot, I think, prevail in opposition to the company's express contract. It was for the company to perform the contract by registering the agree-

(1) Law Rep. 3 Q. B. 584–595.
(2) Ibid. 2 Eq. 501.
(3) 8 Ch. D. 126.
(4) Law Rep. 5 Ex. 111.
(5) 5 Ch. D. 306.
(6) 12 Ch. D. 511.
(7) Law Rep. 8 Ch. 254.
(8) Ibid. 407.

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ment, or by transferring to Mr. *Mudford* shares actually fully paid up. I hold that Mr. *Mudford* had a right of action against the company when it was ordered to be wound up. As regards the damages, I consider that they would have been to be measured and ascertained as to each of the three allotments by the market value thereof at the time when the certificates were received by Mr. *Mudford*, had there then been a market for such shares; but there not having been such market, the Court must fix the proper compensation to be made: which, considering that shares were taken by the public subsequently to the allotments, I assess at the amount of the calls made, or which will be made upon the shares; if the whole £5 per share be called up, I assess the compensation at £5 per share.

Any sums payable to Mr. *Mudford* under his proof will be applicable in the first instance to payment of sums due from him in respect of calls.

Solicitors for Company: *Elborough & Dean.*
Solicitors for Mr. *Mudford: Speechly, Mumford, & Co.*

V.-C. H. 1880 *May* 8.

In re COWANS' ESTATE. RAPIER *v.* WRIGHT.

[1876 C. 346.]

Action for Debt in Common Law Division—Action for Administration—Receiver —Attachment—Rules of Court, 1875, *Order* XLV.

18 Ch D 655
11 QBD 579
5 Ch 5
527.

A receiver who had been appointed in an administration action and ordered to pay to a legatee a sum quarterly out of moneys in or coming to his hands, was, on the application of creditors who had in an action in a Common Law Division obtained a judgment against the legatee, ordered, under Rules of Court, 1875, Order XLV., to pay them their debt and costs.

ON the 19th of June, 1879, *Basil Willis & Co.* obtained a judgment in an action in the Queen's Bench Division against Mrs. *J. C. Cowans* for a debt and costs, in the aggregate £128 11*s.* 6*d.* [1879 W. 721].

On the 16th of July, 1879, Mr. Justice *Field* made an order

upon a summons for payment of the debt by instalments,—£50 in a fortnight, and the balance by two equal payments on the 1st of October, 1879, and the 1st of January, 1880. The instalment due in October was not paid. Under the will and codicil of her late husband, *John Cowans*, Mrs. *Cowans* was entitled to receive during her life £1000 a year out of his residuary estate, which was under the administration of this Court in the action *Rapier* v. *Wright*, in which a receiver had been appointed, who was, on the 5th of June, 1877, directed to pay over to Mrs. *Cowans* out of the income of the estate £250 quarterly, and Mrs. *Cowans* was also entitled to certain rents and profits of real estate during her life, which amounted to about £300 a year, and this sum was payable to her by the receiver in pursuance of the order of June, 1877. On the 19th of December, 1879, upon the application of *Basil Willis & Co.*, an order *nisi* was made in the action in the form made in *Gee* v. *Mahood* (1), and which was, upon reading the judgment and order above mentioned, and an affidavit proving the facts, thus:—

That any sum or sums of money now in or which might come to the hands of the receiver payable or accruing to Mrs. *Cowans* be, subject to any prior incumbrance thereon, attached to answer the sum of £78 11*s.* 6*d.*, being the balance due to the applicants upon or by virtue of the judgment and the costs and interest. And the receiver and Mrs. *Cowans* were ordered to attend before the Vice-Chancellor at his Chambers to shew cause why the receiver should not, after payment of any prior incumbrancer, pay any sum or sums of money now in or thereafter to come to his hands, payable or accruing to Mrs. *Cowans*, to the applicants until the whole of the judgment debt and costs, with interest, should be paid and satisfied.

The application was adjourned into Court.

Charles Browne now moved to make the order of the 19th of December, 1879, absolute. He referred to the cases of *De Winton* v. *Mayor of Brecon* (2), *In re Greensill* (3), *Dolphin* v. *Layton* (4), *Ex parte Turner* (5), and submitted that the substance of those

(1) Seton on Decrees, 4th Ed. p. 1658.
(2) 28 Beav. 200. 6 Jur. N.S. 1046
(3) Law Rep. 8 C. P. 24.
(4) 4 C. P. D. 130.
(5) 2 D. F. & J. 354. 6 Jur. N.S. 1172

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decisions was that before the *Judicature Act*, 1875, the garnishee clauses of the *Common Law Procedure Act*, 1854, which were to be dealt with by the Common Law Courts, applied to a debt, payment of which was capable of being enforced by execution by the Common Law Courts; and the Courts of Chancery would not, in the case of debts, interfere with the Courts of Law, but now the Chancery Division could, under Rules of Court, 1875, Order XLV., deal with the claim as an equitable debt—the word "debt" having an extended meaning, and including equitable debts. Therefore, this money being in the hands of a receiver, an officer of the Court, it was a debt payment of which could be enforced by the Court; and the order could be made to apply not only to the money in hand, but to future sums coming to the receiver. Accounts ought to be taken of what was due to any incumbrancer; the costs, after taxation, provided for, and the residue paid to the applicants until their claim should be satisfied.

The cases of *Tapp* v. *Jones* (1) and *Russell* v. *East Anglian Railway Company* (2) were also referred to.

Aspland, for an incumbrancer, and Mrs. *Cowans*, opposed the application:—

The Rules of Court under Order XLV. are the same, with the exception of slight alterations, as the clauses of the Common Law Procedure Acts of 1854 and 1860. The distinction between debt at law and in equity is abolished. Every Division of the Court can enforce payment of a debt, but I deny that there is a debt in this case due or accruing to Mrs. *Cowans*. There is merely an order by the Court made upon its own officer. The case does not come within the Rules, as execution cannot be issued against a receiver; and rules 4 and 5 of the Order referred to indicate that it must be a debt recoverable by execution: *Whitehead* v. *Lynes* (3). A judgment is not attachable, and the decision in *Dolphin* v. *Layton* (4) is in our favour. Certainly there is here no actual debt in respect of the sums not yet in the hands of the receiver:

(1) Law Rep. 10 Q. B. 591.
(2) 3 Mac. & G. 104.
(3) 31 Beav. 161; on appeal, 12 L. T. (N.S.) 332, 333.
(4) 4 C. P. D. 130.

Jones v. *Thompson* (1); *Hall* v. *Pritchett* (2). *Ex parte Turner* (3) is the only case in the applicants' favour, but it cannot be treated as an authority on the question. The distinction between this and the case of an actual debt *solvendum in futuro* is shewn in the case of *Tapp* v. *Jones* (4), where there was a debt. At any rate the incumbrancer ought to be paid his costs by the applicants, and then they ought to be allowed to add them to their judgment.

C. Browne, in reply:—

The ordinary process against a receiver is committal for contempt: *Foster* v. *Bell* (5). This is a debt which is recoverable by action from the receiver on his recognizance, which might, by leave of the Court, be brought by the applicants, but the Court can, under the Order XLV. and rules, enforce payment of the debt, and that would be equitable execution.

HALL, V.C.:—

In my opinion the applicants are entitled to the order which they ask for. This is a case in which the Chancery Division had not jurisdiction, excepting, possibly, in aid, in some cases, of the Common Law jurisdiction under the garnishee clauses of the Common Law Procedure Acts in operation before the *Judicature Act*, 1875; there are therefore hardly any reported cases upon the subject in the books of the Chancery Division. There is, however, the case of *Ex parte Turner*, in which the Court attached moneys in the hands of an official manager. The application in that case was, as I understand, to the equitable jurisdiction of the Court of Chancery, in aid of the jurisdiction of the Common Law Court, and the subject-matter was treated as a debt which could have been got at under the garnishee clauses, as they then existed, but for the circumstance that the fund was in the hands of an official manager. The attachment was against a company, upon what Lord Justice *Turner* called a debt due from the company. The creditors, however, seem not to have been able to get at it in the Common Law Courts, and to have therefore come to the Court of Chancery in order to have effect given

(1) E. B. & E. 63.
(2) 3 Q. B. D. 215.
(3) 2 D. F. & J. 354.
(4) Law Rep. 10 Q. B. 591.
(5) Law Rep. 9 Eq. 172.

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to their claim. Mr. Justice *Willes* is stated in the report to have made an order to attach the moneys due to the debtor in the hands of the company, the creditor undertaking not to act upon the order in any way except under the direction of the Court of Chancery; that is, he treated it as a legal debt which there was an impediment to get at because of the existence of an official manager who had been appointed by the Court of Chancery. So that it was necessary for the creditor to come to this Court to supplement the order which had been made. Therefore that case shews that this Court, before the *Judicature Act*, interfered in favour of a creditor by removing the impediment in that way, the fund attached being nevertheless treated as a legal debt. The Rules of the Court having by the *Judicature Act* of 1875 been confirmed and made part of the statute (the rules under Order XLV. having been taken from the garnishee clauses of the Common Law Procedure Acts), there is now no difficulty as to the exercise of jurisdiction; and the only question for me to determine is whether a sum of money which had been ordered to be by the receiver appointed in the action paid from time to time in respect of the income to which the debtor is entitled, is available under the rules of Order XLV. to pay the debt in question.

The first objection made is that the receiver, in whose hands the fund is sought to be attached, is not a debtor within the meaning of those rules. An endeavour was made to remove that difficulty by arguing that he is a debtor, because he gives a recognizance in a certain amount for the purpose of insuring a proper application of the funds that come to his hands. To that argument I cannot attach much value; as there is no debt due or recoverable under the recognizance until there has been default by the receiver in the discharge of his duties. Next, is this fund to be considered as a debt from the receiver to the person to whom he was ordered to pay it over? It has been said there are authorities in which it has been considered that money paid in to an officer of the Court, *i.e.*, into the hands of a Master, and remaining to be paid out by him, is not a debt within the meaning of the rules. Although there are some cases in favour of excluding from the operation of the garnishee clauses any sum payable under those circumstances, yet the good sense of the matter is that such money should be available for the purpose

of discharging the claims of creditors, and that the clauses which give the remedy by attachment ought to receive a favourable construction by enabling the creditors to resort to such money. It is not disputed that if the income of this fund were payable to the debtor by a trustee under a settlement, the fund would be attachable, but it is contended that the fact of the fund being payable under an order of the Court—the Court having taken possession of it prevents that income from being subject to attachment. That is a distinction which appears to me to be altogether wanting in justice, and is unsubstantial. Then it was said that there are parts of these garnishee rules under Order XLV. which are inapplicable to the case of a receiver, such as the provisions for issuing execution against a garnishee. The answer to that argument is that those provisions are addressed to the case of garnishees who are in possession and against whom execution might issue, and are meant to be applied where they are applicable; but where the fund is in the hands, as here, of a receiver, who can be got at much more easily than other persons, and without going through the process of *fi. fa.*, and so forth—there the non-applicability of the rules about execution is not a reason why the remedy that would be otherwise available should be excluded. Therefore, I hold that the rules are applicable to a fund payable under an order of the Court, but in the hands of a receiver, just as much as if the fund, were not in Court, but in the hands of a trustee whose duty it was to pay it over to the debtor. Then it was contended that the attachment ought to be confined to anything which is due and payable at the time when the order is made, and if anything becoming due subsequently to that date is to be made available, it ought to be by a subsequent order. There are authorities which countenance that view of the garnishee clauses before the *Judicature Act*, but I think that good sense is to be found in the decision in *Tapp* v. *Jones* (1), and that that case cannot be considered as having depended on the circumstance that the money was due at the time—it was a debt existing but payable in certain instalments—*debitum in præsenti, solvendum in futuro.* That is not the reason of the decision. I consider, therefore, that the words of rule 2, Order XLV., "Debts owing or accruing," though they have been limited in construction by some authorities, ought not to be

(1) Law Rep. 10 Q. B. 591.

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restricted so as to exclude such a fund as this—*i.e.*, income ascertained to be the debtor's property during the whole of her life. To say that it should not be attached would be to leave her at liberty to deal with the future income by selling or mortgaging it. I cannot hold that such a construction of the rules would be the right one; on the contrary, I hold that the order *nisi* which has been obtained rightly extended not only to the money actually in the hands of the receiver, if there were any at the time when it was made, but to future payments as well.

As regards the costs of the proceedings, Mr. *Aspland*, for his client the solicitor, has been shewing cause against the order *nisi* which has been maintained, and he contended that if it were made absolute, his security ought to prevail in respect of his costs of this application, so as to give him precedence for those costs over the order now made. Having regard to the contention before me I cannot make such a special order as to give him priority over prior incumbrancers. There was, no doubt, a question of difficulty to be argued, and he was right in appearing on this application, and I do not, therefore, order him to pay any costs of his appearance here.

The order provided for the retainer by the receiver of his taxed costs of and consequent upon the application out of any moneys in or which might come to his hands as such receiver payable or accruing to Mrs. *Cowans;* for an account of the sums due to the incumbrancer upon his security; for payment of his costs by the receiver out of the moneys in his hands payable or accruing to Mrs. *Cowans;* and that the receiver should, after the retainer and payment aforesaid, pay the residue of any sum or sums of money there was in or which might thereafter come to his hands as such receiver, payable or accruing due to Mrs. *Cowans*, to the applicants, until the aggregate amount of the balance of debt, costs, and interest specified (as in the order *nisi*), and of the taxed costs of the applicants of and incidental to and consequent upon the order *nisi* and the present order, and the application therefor should be fully paid and satisfied.

Solicitors: *W. Hart Chamberlain; Tahourdins & Hargreaves*, agents for *S. H. Jackson, Ulverston.*

In re MANCHESTER AND MILFORD RAILWAY COMPANY.

Ex parte CAMBRIAN RAILWAY COMPANY.

C. A.
1880
April 14.

Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 4—*Rights of Judgment Creditor of Railway — Appointment "of Receiver and, if necessary, of Manager," of Railway.*

The 4th section of the *Railway Companies Act*, 1867, takes away from the judgment creditor of a railway company the right of taking in execution the rolling stock and plant of that company, but gives him new rights, which are independent of the fact whether such company has or has not rolling stock or plant to be taken in execution.

Wherever the judgment creditor of a railway company is unpaid, the appointment of a receiver, or manager, is a matter of right.

And where the debtor company is carrying on its business in the ordinary way, conducting its own traffic arrangements, the appointment of a manager is "necessary" within the meaning of the 4th section.

As a general rule, the directors, or secretary, or some of them, will be appointed by the Court managers where they are acting fairly, and the order for appointment of a manager will be made without prejudice to any application on the part of the directors to propose themselves, or some of their number, to act as managers.

The only evidence required in support of an application under this 4th section by a judgment creditor for the appointment of a manager is an affidavit that he is such a creditor and that his judgment debt is unsatisfied, and that the company is a going concern, carrying on its own business and conducting its own traffic in the ordinary way.

THIS was a petition presented by the *Cambrian Railway Company* under the provisions of the 4th section of the *Railway Companies Act*, 1867, praying for the appointment by the Court of a manager of the undertaking of the *Manchester and Milford Railway*.

The petition alleged, among other things, as follows:—

The last-named railway company was incorporated by the *Manchester and Milford Railway Act*, 1860 (xxiii. & xxiv. Vict. c. 175), with a capital of £555,000 divided into 55,500 shares of £10 each.

By the 20th section of the Act the company was empowered to make and maintain the several railways therein mentioned, and

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by other Acts was further empowered to make and maintain additional railways, and to enter into working and traffic and station arrangements with certain other companies.

The company had constructed and opened for traffic the railways and works authorized; nearly all the shares authorized had been offered and subscribed for.

On the 2nd of November, 1875, the *Cambrian Railway Company*, the Petitioners, signed judgment against the *Manchester and Milford Railway Company* in an action brought by the Petitioners against the said company for the sum of £931 3*s.* 8*d.* On the 4th of November, 1875, the Petitioners also signed judgment against the company for the sum of £787 17*s.* 8*d.* The debts in respect of which the said judgments were signed were both incurred after the passing of the Act of 1867, and both debts were at the date of the presentation of the petition unsatisfied.

By an order of the Court of Chancery, dated the 23rd of July, 1875, on the petition of *George E. Foster* and *J. J. Barrow*, intituled in the same Act, *Poole*, the secretary of the company, was appointed receiver of the undertaking of the company upon his giving security, and certain directions as to payments to be made out of the moneys to be received by him as receiver were given and inquiries directed as to the debts and liabilities of the company, and the rights and priorities of the persons interested in the moneys to come to the hands of the said secretary as such receiver.

By another order of the Chancery Division of the High Court of Justice, dated the 9th of December, 1875, and made in an action between the said *Foster* as Plaintiff against the said company, and also in the matter of the said company and the said *Railway Companies Act*, 1867, certain inquiries respecting the rent-charges granted by the said company and the priorities of the rent-charge holders respectively were directed, and the receiver was, notwithstanding the order of the 23rd of July, 1875, directed to apply any balances in his hands, after payment of the working expenses of the railway, in meeting arrears of rent-charges and the accruing payments thereof, rateably *pari passu*, and liberty was given to the Plaintiff to attend the proceedings on the order of the 23rd of July, 1875.

The conduct of the proceedings under the order of July was in

December, 1877, taken away from *Foster and Barrow* and given to one of the rent-charge holders in the company.

The Chief Clerk made his certificate, and the same was approved and filed on the 6th of December, 1879.

The petition proceeded to allege that the directors of the *Manchester and Milford Railway Company* were also directors of the *Pembroke and Tenby Railway*, and that such directors had been for some time past, and were then, nominees of *John James Barrow*, who had given them their qualification shares, and that the whole management of the company was in the hands of *John J. Barrow:*

That the said *Poole* was formerly a director, and was appointed secretary and receiver at the instance of the said *J. J. Barrow*, who was also the principal share and debenture holder in the *Pembroke and Tenby Railway:*

That the said directors and *J. J. Barrow* forced all the traffic possible over the lines of the *Pembroke and Tenby Company*, and that the *Manchester and Milford Railway* (which was an insolvent company) had been put to considerable expense for the purpose of increasing the traffic over the *Pembroke and Tenby Railway*, that the management of the two railways had been amalgamated, and officials of the *Manchester and Milford Railway* had received notice of dismissal, and that such management was detrimental to the last-named company.

It further alleged that *Barrow* and *Poole* were directors of, and *Barrow* principal shareholder in, the *Cardiganshire Coal Company Limited*, for which company several of the station masters on the *Manchester and Milford Railway* were agents, and that the intimate connection between the railway and coal company had the effect of discouraging competition on the part of local coal dealers and injuring the coal traffic.

It appeared from the Chief Clerk's certificate that the said company was indebted to several persons in respect of rent-charges, and mortgages and debentures, and also of simple contract debts.

The 4th section of the *Railway Companies Act*, 1867, was made perpetual by the 38 & 39 Vict. c. 31.

Numerous affidavits were filed by the Petitioners in support of the several allegations contained in the petition.

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The *Manchester and Milford Company* was carrying on business in the ordinary way—working its own line and conducting its own traffic under the management of its board of directors.

A summons had been taken out to remove *Poole* from the receivership, which came on with the present petition and which in the result was adjourned.

Vice-Chancellor *Hall* dismissed the petition with costs, on the ground that in spite of the allegations contained in the petition he did not think it a case in which it was necessary, within the meaning of the words of the 4th section, for the Court to appoint a manager.

The *Cambrian Company* appealed.

Hastings, Q.C., and *Kenyon Parker*, for the Appellants:—

The 4th section of the Act of 1867 took away from judgment creditors of railway companies their original right of taking the plant and rolling stock of their debtors, and substituted a remedy, viz., the right of applying to the Court for the appointment of a receiver and, if necessary, a manager—that is, if necessary for the protection of creditors. The present management of this railway is prejudicial to the creditors.

[JESSEL, M.R.:—It is not necessary to establish a case of mismanagement; "if necessary" means if it is necessary to carry on the business. A mortgagor has no right to possession or to management against his mortgagee or judgment creditor.]

They were stopped by the Court.

W. Pearson, Q.C., and *W. Barber*, for the Respondent:—

A petition has already been presented under the same Act by judgment creditors upon which an order has been made appointing a receiver and giving him directions as to making payments out of the moneys he receives, leaving the management in the board of directors. The receiver receives all the income of the railway, and he must provide for the current expenses of the railway, and distribute the surplus among the creditors.

[JESSEL, M.R.:—A receiver is one who receives the tolls and applies them for the payment of debts: he does not sell, or provide

for the current expenses: if he has to pay money to carry on the business he is a manager.]

If a manager is appointed the management is taken out of the hands of the directors, who are the persons appointed by Parliament and made responsible for the proper working. The directors will require from the receiver what is necessary for providing for the carrying on of the railway, and he will pay it them and hand over the surplus to the creditors.

[JESSEL, M.R.:—Then that cuts out from the section the word "due." How is he to ascertain what is due provision, unless he has some control over the expenditure?]

In *Ames* v. *Trustees of the Birkenhead Docks* (1), a receiver was appointed of the tolls, and directed to pay into Court the balance after payment of the expenses of carrying on the business, and there the Master of the Rolls said (2): "What the receiver takes are the rates, tolls, and rents. Out of the moneys so received by him, he pays the expenses of the undertaking. . . . The undertaking continues to be managed by the trustees. . . . The expenses they incur in so doing are paid by the receiver, who in that character has nothing to do with the management. He simply pays the bills and moneys which the trustees require him to do subject to account hereafter, if anything improper should take place in relation to such payment." And in *Potts* v. *Warwick and Birmingham Canal Navigation Company* (3) a receiver was appointed of the rates, tolls, and dues of the company, and directed to pay into Court the balances remaining in his hands after payment of the costs, charges, and expenses of carrying on the business of the company, and a judgment creditor of the company was only held at liberty to issue an *elegit* on his judgment, without prejudice to the rights of the receiver, and also subject to the rights of management by the company.

[JESSEL, M.R.:—In those cases the receiver was receiver of net profits. This statute has not constituted a receiver of net profits.]

In *Gardner* v. *London, Chatham, and Dover Railway Company* (4) the order continues receivers of the general undertaking

(1) 20 Beav. 332.
(2) Ibid. 350.
(3) Kay, 142.
(4) Law Rep. 2 Ch. 201, 212.

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and of the tolls, &c., and in that case Lord *Cairns* held that it was improper in the Court to appoint a manager even if the company itself did not object, for the duties imposed by Parliament on the company could not be delegated or transferred. The Orders made in pursuance of this Act of 1867, and the accounts and inquiries to be directed in proceedings taken under the Act, seem to contemplate the appointment of a receiver, even when a company is managing its own business in the ordinary way: *Godefroi* on Railway Companies (1); Orders XXIX. and XXXI. In this case the petitioning company are creditors to a very small amount, and all the debenture and rent-charge holders are paramount to them. However, if wherever a railway company is managing its own business a manager is necessary within the meaning of the Act, all the judgment creditor has to prove is that his judgment debt is still unsatisfied, and that the company is working its own line, and this mass of affidavits is quite unnecessary.

JESSEL, M.R.:—Yes.

JESSEL, M.R.:—

The appeal in this case is from a decision of Vice-Chancellor *Hall*, refusing an application by a judgment creditor of an insolvent railway company for a manager. The railway company, it appears, is carrying on business in the ordinary way, conducting its own traffic under the management of a board of directors. It appears also that the company has been, for at least five years, in insolvent circumstances, that a receiver was appointed some years ago at the instance of debenture creditors, as I gather, and that mortgagees have since intervened and got the benefit of the receivership, so far as any surplus applicable to the payment of their debts exists.

The question raised by the petition is one affecting the true construction of the 4th section of the Act of 30 & 31 Vict. c. 127, which for the first time protected the rolling stock of a railway company from executions. The point as to the true construction of that section, in reference to the appointment of a manager, does not appear to have been argued before or decided upon by the Vice-Chancellor.

(1) Page 511.

The only point argued before him, as I understand, was whether, under the special circumstances of the case, the board of directors of the company had so conducted themselves as to shew that it was improper that they should be allowed to remain the managers of the company; and upon that point he entertained an opinion adverse to the Petitioners, and dismissed the petition with costs.

It appears to me that when you look at the 4th section and endeavour to ascertain its objects, it means this in substance, that it not only prevents the rolling stock, &c. (I will read the words presently) of the railway company from being taken in execution, but it gives new rights to judgment creditors of railway companies, which rights are wholly independent of the fact that the railway company had or had not rolling stock to be taken in execution. It is not a mere substitution of another remedy in place of the remedy taken away, but it is an entirely new right given to all judgment creditors of railway companies; although probably, indeed one knows historically it was so, the reason for giving them the new rights was that the old rights were taken away, and were taken away for the benefit of the public, and not for the benefit of the railway company.

Now the two parts of the section, though united by the word "but," as I have said before, are independent of one another. The first is this: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway, or any part thereof, is open for public traffic, be liable to be taken in execution at law or in equity, at any time after the passing of this Act and before the 1st day of September, 1868, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act." That merely takes away the right; and even that part of the section, it may be observed, applies not merely to railway companies which are working their own traffic, but also to railway companies whose traffic may be worked by another com an , because although, as a rule, I believe

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where a railway company's traffic is worked by another company, that railway company has not rolling stock, yet there are exceptions where they had rolling stock at the time of the arrangement; and, independently of that, they may have plant and effects at their stations or workshops, whether they have rolling stock or not—the furniture at stations, for instance. Therefore, even that part of the Act does not necessarily exclude a company which has no rolling stock, although *primâ facie* undoubtedly it contemplates the case of a company which has rolling stock and which is open for public traffic.

Then the next part of the section is quite independent: "but the person who has recovered any such judgment may obtain the appointment of a receiver and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery in *England* or in *Ireland*, according to the situation of the railway of the company, and all money received by such receiver or manager shall after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein," and then the Court may, on payment of the amount, discharge such receiver.

Now, it is to be observed here that any one who has recovered judgment may get the appointment of a receiver and manager. There is nothing whatever in the second part of the section to shew that a railway company must necessarily be working its own traffic. It may be a leased line; it may be a line as to which there is a traffic arrangement that the traffic shall be worked by another company.

It may be (although possibly those companies do not exist in *England* now, but they were contemplated by the framers of the Railway Acts) a company which merely took tolls for the passing of carriages over its line, and neither had a working agreement nor a lease. No doubt in contemplation of law such a thing may exist, and was undoubtedly contemplated by the original framers of the Railway Acts.

That being so, what is the meaning of "the appointment of a

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receiver and, if necessary, of a manager"? "A receiver" is a term which was well known in the Court of Chancery, as meaning a person who receives rents or other income paying ascertained outgoings, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind. We were most familiar with the distinction in the case of a partnership. If a receiver was appointed of partnership assets, the trade stopped immediately. He collected all the debts, sold the stock-in-trade and other assets, and then under the order of the Court the debts of the concern were liquidated and the balance divided. If it was desired to continue the trade at all, it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade. The same distinction was well known also in the working of mines. If a receiver only was appointed, the working of the mine was stopped, but if it was desired to continue the working of the mine, a receiver and manager was necessary. So that there was a well-known distinction between the two. The receiver merely took the income, and paid necessary outgoings, and the manager carried on the trade or business in the way I have mentioned.

When you come to a case of a railway company you see this directly, that if it is carrying on business it wants a manager. The words are not "if it shall be expedient," or "if it shall be desirable," but "if it is necessary," and it is necessary in every case where there is a business to be managed. You must have some kind of manager, and the only question is, whether the manager is to be appointed by the Court, or whether the Court may allow anybody else to become manager without any appointment of a manager by the Court. I think when you come to the next words it is plain that the manager, where a manager is necessary, should be appointed by the Court. The words are, "and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company," and so on. I will first deal with outgoings "and other proper outgoings." The receiver is to pay the "proper outgoings." But how? He pays them under the

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direction of the Court, and only gets them allowed in passing his accounts, and if he shews they are proper, and, therefore, the payment of the "proper outgoings" is subject to the supervision of the Court. Does not this also apply to the "working expenses"? It says: "and all money received by such receiver or manager shall after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking be applied and distributed under the direction of the Court," in such and such a manner.

Now, money received by the receiver is under the control of the Court. The receiver has to account for it and pass his account, and it is to be applied in some way. In what way? It is to be applied in this way: "and all such money received by such receiver or manager shall after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking be applied and distributed," and so on. What does "due provision" mean? The person in receipt (call him receiver or manager) has received some money, and the money received by him is to be applied in making "due provision" for the expenses. Who is to ascertain what is "due provision"? How are you to find out what is "due provision"? It seems to me manifest that that must be under the control of the Court, just the same as "proper outgoings." The receiver, who is the officer of the Court, or the manager, who is the officer of the Court, or the person who receives the money (if that is the right term to use, it is the money that is received) is to see that it is applied in making "due provision." I must say that I see no other way of ascertaining the "due provision" except by keeping the control of the Court over the expenditure, and that makes the whole thing clear. If, on the other hand, a manager is not appointed, but somebody else manages, and the receiver comes to pass his accounts, how can he shew that the money he has received has been applied "after due provision for the working expenses of the railway"? You have no account of working expenses. All you know is, that the directors, or other the managing body, have called upon you for certain sums for the purpose of the management of the railway. You cannot ascertain whether they are fair working expenses or what. They may be for prospective additions to the plant, or

things of that kind, with a view to the future development of the traffic of the railway—very proper expenses for a board of directors to make, but not merely "working expenses." There is no means whatever by which the receiver, who has no power of inquiry and no power of discovery as regards the directors, can shew that he has only made "due provision" for the working expenses of the company, unless the Court, in some way or other, has the power of seeing that the money spent is applied in the working expenses or in the proper course of management. It seems to me that when you come to consider it, and when you give proper weight to the words "if necessary"—when you come to give proper weight to the word "due," and proper weight to the ordinary course of the Court of Chancery in appointing a receiver as distinguished from a manager—where the business is to be carried on, it is a case for appointing a manager. Of course manager may mean managers in the plural.

That, however, by no means decides the question who is to be manager. It may well be, and probably would be, as a general rule, that the persons most familiar with the management and most competent to manage the railway would be the board of directors. If they were acting fairly and working fairly, they would, most likely, be appointed; and in fact, in practice, I believe, as a general rule, either the directors are appointed, or some of them, or the secretary, so as to keep the management in the board of directors. But that is a question of the persons to be appointed, and if you appoint the board of directors or the secretary, or a selection from the board of directors, to be manager or managers, the Court then has the control.

The Court says, "You must shew that this money has been expended in the working expenses of the company and in other proper outgoings, and, to that extent, we will allow it; and if you attempt to employ money for other purposes, we will disallow it." In that way it seems to me that every proper object can be secured. You will not interfere unduly with the management of the railway company, you will not prevent its being managed in the best and most effective manner, and, at the same time, you will protect the creditors from that which might be very proper for an ordinary board of directors of a solvent concern, namely,

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the laying out of money with a view to the prospective development of the line before they have paid their debts.

I think, therefore, that in a case of this kind there should be an order for the appointment of a manager.

The only remaining point is as regards the costs. What has happened in this case is this. The Petitioners alleged that the directors had so misconducted themselves that it was not proper to continue them in the management. The Vice-Chancellor has intimated his ultimate opinion—whatever some of the expressions used in the course of his judgment may mean—to be against the Appellants, because he has dismissed the application with costs, and, therefore, so far as it was before him on the then evidence, he decided that there was not a case made out for removing the directors from the management, assuming them to be properly in the management of the railway. But, as that decision so far will be interfered with by directing the appointment of a manager, it appears to the Court that it will be well to insert in the order that it is to be "without prejudice to any application by the directors to be appointed managers by the Court," so that he can appoint them if he likes, and if they are proper persons to be appointed. As regards the costs, the costs of the Appellants, both here and below, ought to come out of the fund which is liable to pay their debts. It must not be paid out of funds belonging to other people in priority, and, therefore, those costs, with the exception I am about to mention, should be added to their debts; but there should be an exception of the costs of the evidence so far as they have been increased by the evidence in support of the petition, which last-mentioned costs are to be in the discretion of the Vice-Chancellor. Of course, there is no occasion to say anything about the costs of the Respondents. They have the fund out of which they can pay them, or, if not, they can apply to the Vice-Chancellor for an order as to their payment.

BAGGALLAY, L.J.:—

I adopt the same view as that which has been expressed by the Master of the Rolls as to the construction to be put upon the 4th section of the *Railway Companies Act*, 1867. That section

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had two objects to effect. The one was to protect the rolling stock and the plant of railway companies which were actually working, from being taken in execution at law or in equity at the instance of judgment creditors; and the other was to confer upon the judgment creditors another, and in some respects a compensating, benefit for that of which they had been deprived by the earlier part of the section.

Now, the protecting part was simply this, that the rolling stock and the plant should not be taken in execution at law or in equity at any time after the passing of that Act at the suit of a judgment creditor. Down to the time of the passing of the Act, the judgment creditor had that remedy; the Act deprived him of it, and we have to consider what is the compensating advantage conferred upon him by the Act. Previously to its passing, the appointment of a receiver deprived the partners in any business of their rights to interfere in its management; in most cases it practically stopped the continuance of the business. On the other hand, it was not the practice of the Court of Chancery to appoint a manager of a business unless with a view to winding up its affairs. But a practice had grown up of appointing not only a receiver, but in some instances a manager also of a railway, subject to certain rules and conditions.

Very shortly before this Act was passed a decision was given by the Court of Appeal in Chancery in the case of *Gardner* v. *London, Chatham, and Dover Railway Company* (1), and in that case the practice was considered which had been up to that time adopted in the Court of Chancery of appointing not only a receiver, but in some cases a manager also of a railway company.

The case of *Gardner* v. *London, Chatham, and Dover Railway Company* was an appeal against orders made by the Vice-Chancellor to that effect. But it was held by the Court of Appeal that the Court of Chancery had no power to appoint a manager of the railway. Lord Justice *Turner*, in the course of the argument, observed that the Court had no such power, and the judgment given by Lord Justice *Cairns* was based upon two grounds; first, upon the ground that it was not the practice of the Court of Chancery to appoint a manager with a view to the continuance of a business, and that

(1) Law Rep. 2 Ch. 201, 212.

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that would be one of the objects of appointing a manager of the railway company's business; and the other ground was this, that powers had been conferred on the directors of managing the railway for certain purposes. "These powers," it was said, "must be executed and these duties discharged by the company. They cannot be delegated or transferred. The company will of course act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not by agreement hand over the management of the railway to the debenture holders. It is impossible to suppose that the Court of Chancery can make itself or its officer, without any parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management." I need not refer further to that case, but I think that if we have regard to the effect which the appointment of a manager would have had, we shall readily see what benefit it was intended to confer on the judgment creditor when he was deprived of his right to take the rolling stock and plant in execution.

It is this, that he may apply to the Court, if he thinks fit, for the appointment of a receiver, and, if necessary, of a manager. If the appointment of a receiver of the affairs of the railway company were to have the same effect as the appointment of a receiver of the profits of the business of a partnership, it would be to stop the concern. At the same time, there had been a duty imposed on the directors of continuing the concern. Therefore, in order to get over the difficulties that were felt in the case of *Gardner* v. *London, Chatham, and Dover Railway Company* (1), the Act went on to provide that "if necessary," that is, if the appointment of a receiver would lead to a stoppage of the concern, a manager should be appointed, and that notwithstanding that by virtue of the original Act of Parliament the power of managing the affairs of the company had been vested in the board of directors, such power should be vested in the manager so appointed; and then the Act goes on to provide, as the Master of the Rolls has pointed out, in what way the money which should come to the hands of the receiver or manager should be applied; all indicating this, that

(1) Law Rep. 2 Ch. 201, 212.

the manager was to be appointed with full power of managing and carrying on the business of the company with those powers which it had been supposed the Court of Chancery had power to confer on him previous to the decision in the case to which I have referred.

It appears to me, therefore, that if the railway company is to be continued as a going concern, when a receiver is appointed, there must be conferred on some person or persons the power of continuing or carrying on the business of the company. That is the meaning which I attribute to the use of the words "if necessary." The judgment creditor may appoint a receiver with all the consequences of the appointment of a receiver alone; but that might be to deprive him of the very source from which the possibility of ultimate payment would be derived. If the business of the company is to be continued as a going concern it is "necessary" to have a manager.

On the other part of the case I agree with what the Master of the Rolls has said.

BRAMWELL, L.J.:—I concur.

The case was accordingly referred to the Vice-Chancellor to appoint a manager without prejudice to any application by the directors proposing themselves or some of their number as managers. The costs of the Appellants below and on the appeal to be added to their debt, except so far as they had been increased by the evidence which had been entered into, the whole of the costs of such evidence to be left to the discretion of the Vice-Chancellor.

Solicitors for Appellants: *Fallows & Brown.*
Solicitors for Respondents: *T. White & Sons.*

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In re CANADIAN LAND RECLAIMING AND COLONIZING COMPANY.

COVENTRY AND DIXON'S CASE.

Companies Act, 1862, s. 165—*Misfeasance of Directors—Acting as Director without Qualification.*

Two gentlemen were appointed, and for some time acted, as directors of a company in which the qualification for a director was the holding 100 shares. Neither of them was the holder of any shares. No act of misfeasance was alleged against either of them for which he would have been liable if he had been a duly qualified director. The company was now in course of being wound up. The liquidator applied under sect. 165 of the *Companies Act*, 1862, to charge them for misfeasance in acting as directors without qualification:—

Held, by the Master of the Rolls, that by acting as directors they had been guilty of a misfeasance, for which they were liable under the *Companies Act*, 1862, sect. 165, and ought to be ordered to pay a sum equal to the nominal amount of the shares requisite to qualify them to be directors.

Held, on appeal, that sect. 165 creates no new right, but merely provides a summary mode of calling directors to account for acts of impropriety, for which they are liable to an action; that to make a person liable under it, he must be shewn to have been guilty of some misconduct by which the company has suffered loss; and that the application must, therefore, be dismissed.

THIS was a summons by the liquidator of the *Canadian Land Reclaiming and Colonizing Company*, under sect. 165 of the *Companies Act*, 1862, to make *Coventry* and *Dixon* liable for misfeasance in having acted as directors without being qualified.

The company was registered in January, 1876, with a nominal capital of £15,000, in 3000 shares of £5 each. The articles contained the following provisions:—

"67. Every member holding not less than 100 shares shall be eligible as a director."

"68. The number of directors shall not be less than three, or more than twelve."

"69. *J. P. Stewart*, *W. H. Smith*, *J. Whyte*, and *Thomas Silk* shall be the first directors of the company, who shall have power to add to their number within the above limit at any time before the fourth general meeting of the company."

"102. The office of director shall be vacated if he give three months' notice in writing to the secretary of resignation; if he cease to hold his due qualification; if he become bankrupt, or be declared insolvent, or be convicted of any felony, or of unsound mind."

"104. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointments of any such directors or other persons acting as aforesaid, or that any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

At a meeting of the board of directors held on the 13th of September, 1876, Lieutenant-Colonel *Bruce* and *Coventry* and *Dixon* were chosen directors. Neither *Coventry* nor *Dixon* ever applied for or held any shares. At this same meeting a prospectus was finally settled, which was shortly afterwards issued, containing the following passage: "Seven hundred shares in the company have been *bonâ fide* applied for and allotted. Subscriptions for 1400 shares are now invited. No allotment will be made unless the whole are applied for."

It appeared from the minute book of the meetings of directors that *Coventry* and *Dixon* attended several board meetings. At an extraordinary general meeting on the 1st of February, 1877, at which *Coventry* was present, a resolution was passed for the voluntary winding-up of the company, but not by such a majority as was requisite to make it a special resolution, and no further meeting was held to confirm it. At this meeting *Coventry* intimated his resignation of the office of director. No applications for the 1400 shares having been made, no allotment ever took place. The company having proved abortive, an order was made in July, 1877, for winding it up.

The liquidator applied to place the names of *Coventry* and *Dixon* on the list of contributories for 100 shares each. This summons was adjourned into Court, and on the 8th of August, 1879, was refused by the Master of the Rolls.

In October, 1879, the liquidator took out a summons asking that *Coventry* and *Dixon* might be respectively ordered to con-

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tribute to the assets of the company £500, being the value of 100 shares in the company, which they ought respectively to have taken to qualify them as directors, or to respectively contribute such other sums by way of compensation for their respective misfeasance in not taking such qualification shares as the Court should think just.

No allegation was made that either *Coventry* or *Dixon* had done or concurred in any act which would have made him liable for misfeasance if he had been a duly qualified director.

The summons came on for hearing before the Master of the Rolls on the 29th of January, 1880.

Seward Brice, for the liquidators, contended that *Coventry* and *Dixon* were guilty of a "misfeasance" within the meaning of sect. 165 of the *Companies Act*, 1862, by reason of their having acted as directors of the company without the qualifications required by the articles, and were liable to pay such sums by way of compensation in respect thereof as the Court might think fit.

Davey, Q.C., and *H. B. Buckley*, for *Coventry* and *Dixon*, contended that there had been no misfeasance within the meaning of the section, and that they could not be made liable.

The case of *Gibson* v. *Barlow* (1) was referred to.

JESSEL, M.R.:—

I am very glad this point has come for decision, because I think it a most important point as regards the power of the Court, by virtue of the 165th section of the *Companies Act*, to do justice in a case like this.

Now, what is the case? Two gentlemen of the name of *Coventry* and *Dixon*, who are not the less aware of their liabilities because they happen to be lawyers of experience, being Writers to the Signet, are elected directors of this company. They must be presumed to have been aware of every line in the articles of association before they accepted the position of directors, and of their liabilities under it. What was their position when they had consented to be and acted as directors? As regards the consent

(1) Law Rep. 10 Q. B. 329.

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to act, there is no question about it. One of them attended four meetings, and also a general meeting of the company, which was the last called, as a director. One attended two meetings, and never seems to have resigned; the other did resign. Therefore, there is no question about an acceptance of the office, and their acting, I may say, at all these meetings. Resolutions were passed, some of them of vital importance. At one of them the prospectus was passed, at which both were present. It was issued, no doubt, marked "for private circulation," which means a private circulation amongst everybody to whom it was sent. In it the names of these gentlemen appear as directors. Shares were taken before the prospectus was issued; debts were incurred before and afterwards.

The first question I have to decide is, what were their liabilities according to the articles? According to the 67th article, every member holding not less than 100 shares was to be eligible as a director. Neither of these persons had that number, but in spite of that article shewing they were not eligible, they chose to accept the position and chose to act. Then the 102nd article is, "The office of director shall be vacated," amongst other things, "if he cease to hold his due qualification;" shewing, therefore, the qualification was not only a condition of eligibility, but was also a condition to act if he had the qualification. Then the 104th is an important one: "All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or other persons acting as aforesaid, or that any of them were disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director." So that under this article the acts of these men bound the company; and this really follows the 67th section of the Act, which provides that "all appointments of directors shall be deemed to be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications." The clause was rather wider than that, but it comes to the same sense.

Then what is the result? That these gentlemen, knowing of this, act as directors and can bind this company. Is not this a

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misfeasance? Is it not a wrongful act? Can there be any doubt or question about it? They took part in the management of the company, knowing they had no right to intervene at all, and actually bound the company by their acts, notwithstanding they did not have that interest in the company which was the safeguard appointed by the articles of association to protect the company against the directors acting otherwise than for the interest of the company, for that is the meaning of the qualification. The powers of the company are delegated to persons, whose own interest being considerable will induce them to use those powers for the benefit of the company. They are not delegated to strangers, to persons who have no interest, and who would therefore probably act for their own individual benefit as against the interests of the company. It does appear to me to be as plain a case of misfeasance or misconduct as you can possibly state, and upon that point I think it was too clear for argument.

The next question I have to consider is, whether I can reach these gentlemen, for I certainly will, if I can, under the 165th section. The 165th section is this: "Where in the course of the winding-up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied, or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may"—do something on the application of the liquidator or creditors.

I will consider for a moment whether they are so brought within the description of "any officer" of the company. No doubt they were not properly elected, and were, therefore, not *de jure* directors of the company; but that they were *de facto* directors of the company is equally beyond all question. The point I have to consider is whether the person who acts as *de facto* director is a director within the meaning of this section, or whether he can afterwards be allowed to deny that he was a director within the meaning of this section. I think he cannot. We are familiar in the law with a great number of cases in which a man who assumes a position cannot be allowed to deny in a Court of Justice that he really was entitled to occupy that position. The most familiar

instance is that of executor *de son tort*. In like manner, it seems to me, in an application under this section, the *de facto* director is a director for the purposes of the section. If he had taken the company's money, if by reason of becoming a director he had obtained the power of disposing of the money of the company (which he certainly could do under the 104th clause of the articles of association) and had appropriated it to his own use, would it be tolerable to allow that man to say he had not acquired the money by virtue of his position as a director, and to say he was not a director under this section? This section is a section intended to punish torts or wrongs. The Act does in the 67th section, and elsewhere in Table A, deal with persons who are *de facto* directors, and there is no violation of the language in treating the *de facto* director as a director for the purposes of this section. But besides that there is the word "officer," which is a larger term. I have no hesitation in saying under the term "officer" these people are guilty of "misfeasance" under the 104th section, for a disqualified director has the power to manage the company, and by his acts to bind the company. In what capacity except as officer of some kind? Whether, therefore, they can be properly described as directors or not (and I think they can be so properly described) I am satisfied they can be included under the term "officer." Therefore, I think they are within the section.

As regards the first point my view is very strongly confirmed, as it appears to me, by the case to which I have been referred of *Gibson* v. *Barton* (1). There are other sections in this Act, no doubt, in which a manager is liable to be punished, and Mr. Justice *Blackburn*, now Lord *Blackburn*, says (2) (the particular person referred to in that case never having been appointed manager, but having acted as such): "The question, therefore, is, whether a person who is thus a manager *de son tort*—a manager in his own wrong—whether he can protect himself from the liability cast upon a manager under sect. 27, by saying 'I am not manager *de jure*.' I think he cannot. There are many instances in which a person who *de facto* exercises an office cannot defend himself by saying, when he is called upon to bear liability in consequence of his wrong, 'I am not rightfully in the office, there is

(1) Law Rep. 10 Q. B. 329. (2) Law Rep. 10 Q. B. 337.

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another man who may turn me out.' An executor *de son tort* is an instance in which a man incurs all the liabilities of an executor as to third persons, and he is not permitted to say, 'I am not executor, there is another man who may take out probate.' The answer is, 'Your liability as to a third person rests upon your being executor *de son tort;* you have usurped the office and must bear the liabilities.' " Then he goes on to the case of seizure and to other cases I will not mention; but I will mention a case within my own experience as an illustration. There was a mayor of a well-known town in the south of *England* who knew he was wrongfully elected mayor. He was afterwards decided by the Queen's Bench to have been wrongfully elected. But in the meantime, with that respect for law, or disrespect for law, which prevails sometimes in *England*, with a view to securing his own re-election he struck out of the roll the bulk of the voters who would have voted for somebody else, though he was decided not to be rightfully elected. After the expiration of his year of office an action was brought on the ground that he, as a mayor, had executed a purchase, though he was not allowed to finish it on the ground that he was unlawfully mayor. He was held liable because he had assumed to be a mayor and had acted as mayor, having struck these men out of the roll as mayor; of course he was liable for that which was a nullity, but he was *de facto* mayor. I only mention that as an illustration of what is intended by law for the purposes mentioned. I agree with the judgment of Mr. Justice *Blackburn*, and Mr. Justice *Lush* agreed with it, but my late lamented friend Mr. Justice *Quain* did not agree with it.

I come now to the next point, the prospectus. These gentlemen committed a misfeasance, and a very serious misfeasance, but it is a double injury, because they, having no interest in the company, yet deal with the property and rights of the company, much to its prejudice, because the company is deprived of the protection for which it sought. But besides that, they really may—I do not know that it is necessary to shew that they did, but they may—have obtained credit; the creditors may have been induced or may not have been induced to give credit. But in addition to that, it does not follow that the company would have gone on at all unless they had been directors. Supposing all the directors had been

disqualified, the company could not have gone on at all. There might have been no quorum without these two gentlemen, and then the company could not have gone on.

It does not appear to me necessary to consider whether any particular gentleman was or was not induced to give credit. I have it proved in fact that credit was given to the company, and when it was wound up it had not sufficient assets, nor will it have if I make these gentlemen pay what I am going to order, to meet that credit.

Now, I come to the last point. The section provides as follows: "The Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just." Now, what should the Court think fit to do in a case of this kind? I cannot measure the damage done to the company. I cannot say how these gentlemen would have acted if they had been restricted in acting by the fact of their holding a substantial interest in the company. I cannot tell what the result would have been, or whether that would have stopped the company at an earlier period. It is impossible to ascertain the damage in that way.

In the next place, I cannot say what wrong has been done to the creditors. The company might have been stopped at an earlier period and some of these people not have been creditors at all. It is impossible to ascertain exactly the amount of damage done. But I am not limited to that. It is what "the Court thinks just." Now what ought the Court to think just? There is no shadow of pretence on their part that they could have or would have bought the shares. They have put in no affidavit stating anything. It appears to me just that they should be liable for the amount for which they would have been liable to

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the company, that is, to the creditors of the company, if they had acted rightly and taken the shares. I think they have no right whatever to complain if the Court says as between them and the creditors they shall be in no better position than if they had not committed the misfeasance, that they shall make good their representation that they were directors properly elected and properly acting. That does afford me the measure of compensation, and a rightful measure, which I can rely on as being a satisfactory principle on which to decide this case; and so holding, I hold that each of these gentlemen must contribute £500 to the assets of the company, being £5 per share on the 100 shares, which they ought to have held, and that they ought to pay the costs of this application.

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From this decision *Coventry* and *Dixon* appealed. The appeal came on for hearing on the 24th of April.

Davey, Q.C., and *H. B. Buckley*, for *Coventry*; and *W. Pearson*, Q.C., and *Speed*, for *Dixon*:—

These gentlemen may in a sense have been guilty of misfeasance, but it is not alleged that the company has lost anything through them. We contend that sect. 165 was not intended to give the Court a power of fining directors for misconduct. It creates no new right, but was only intended to give a summary remedy in the winding-up for misfeasance which would otherwise have been the subject of a separate action. Its purpose was to facilitate the making compensation to the company, not to punish directors. On the authority of *Jenner's Case* (1) it was held that these gentlemen were not contributories. Then the liquidator comes under sect. 165 alleging that they are directors, and seeking to make them liable for not having been qualified. We do not dispute that if these gentlemen had wasted the moneys of the company, they would have been liable under this section. If they acted as directors it would not have lain in their mouths to say they were not directors, for the purpose of escaping liability, but no improper acts are alleged against them. It is suggested that some people may have been misled into taking shares by

(1) 7 Ch. D. 132.

seeing the names of the Appellants among the directors. If so, that may give those persons a right of action, but the liquidator only represents the company; and that persons were deluded into taking shares is a benefit to the company. Moreover, the fact is that there was no allotment of shares and no transfer of shares after the appointment of these gentlemen. If a creditor gave credit to the company on the faith of their names, that again is no injury to the company, and the liquidator represents the company, not the creditors: *Waterhouse* v. *Jamieson* (1). The misfeasance of appointing these gentlemen directors without qualification was the act of the other directors, and the proceedings ought rather to be against them.

[*Poole, Jackson, and Whyte's Case* (2) was also referred to.]

Ince, Q.C., and *Seward Brice*, for the liquidator:—

The Appellants, acting without authority, concurred in a series of acts which ended in making the company insolvent. That the acting as directors without a qualification is a misfeasance is not disputed, and the question is what injury to the company resulted. If it can be inferred from the evidence that any liability was imposed on the company at any meeting at which the Appellants took part in the proceedings, we are entitled to maintain our order. If they had been duly appointed with the proper number of shares the company would have been so much the richer, and they would have had a stake in the company which would have inclined them to manage its affairs with more prudence. It appears from the remarks of Lord *Hatherley*, in *Waterhouse* v. *Jamieson*, that a liquidator may assert claims which the company itself could not. *Moore & De La Torre's Case* (3) is in our favour.

JAMES, L.J.:—

With all deference to the Master of the Rolls, and the strong opinion he has expressed in this case, we differ from his decision. I am of opinion, speaking with all respect, that he has not been construing the Act, but legislating for the purpose of putting a stop to a proceeding which is no doubt wrong, that is, the acting

(1) Law Rep. 2 H. L., Sc. 29. (2) 9 Ch. D. 322.
(3) Law Rep. 18 Eq. 661.

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as director without having the qualification required by the articles. It might be very right for the Legislature to declare that where there is a qualification prescribed for the office of director, every person acting as a director should be held to have taken the number of shares constituting his qualification, but the Legislature has not done so. In this case we have only to apply sect. 165. I am of opinion that that section does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts. In order to enable the Court to apply that section, the liquidator, as it seems to me, must shew something which would have been the ground of an action by the company if it had not been wound up. I am of opinion also that the word "misfeasance" in that section means misfeasance in the nature of a breach of trust, that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any moneys of the company, or by which the company's property has been wasted, or the company's credit improperly pledged. It must be some act resulting in some actual loss to the company. Now, it appears to me that a person nominated as director in violation of the articles without proper qualification, and accepting that nomination and acting as a director, has not thereby been guilty of any such misfeasance or breach of trust in relation to the company. It was admitted by the Appellants that these persons, as *de facto* directors, would be liable for any act of commission or any omission on their part in the same manner and to the same extent as if they had been *de jure* as well as *de facto* directors. They were, so to say, directors *de son tort*, and liable in that character, but not otherwise, and you must shew something that they did which resulted in loss to the company, and for which, if they had been duly appointed directors of the company, the company would have been entitled to a remedy against them. Now, what is the wrong done? It is said that they acted as directors, but it is not pretended that any damage resulted to the company from what they did while so acting as directors, for they only joined in acts for which every other director who was present and joined in them would have been equally liable. But it is said that being directors they

ought to have done—what? They ought to have taken shares. They could not have taken shares, because at the very time when these gentlemen were nominated as directors a prospectus was issued which announced that 700 shares had been *bonâ fide* applied for, and a fresh issue of 1400 shares was proposed, and the public were invited to apply for 1400 new shares, with a promise on the part of the company that no share should be allotted unless the whole 1400 were taken. No applications were made for these 1400 shares, and it therefore was impossible for shares to have been allotted to these gentlemen. But, independently of that, it appears to me that these gentlemen would not have been liable even if there had been any number of shares capable of being allotted, for there was no contract, implied or expressed, that they should take those shares. It having been held by the Court that there was no such contract implied, what have they omitted to do so as to cause damage to the company? If they had not become directors what would have happened? There is no suggestion that if they had not taken the office two other gentlemen would not have taken it. I am, therefore, at a loss to see that any damage whatever has resulted to this company from anything that these gentlemen have done or have omitted to do. Then, how is the amount with which they are charged arrived at? It is the amount payable on 100 shares each, and I cannot see why they are to be responsible for that sum any more than for the whole debts of the company. It has been suggested that if they had not been directors of the company, the company possibly would not have failed, but I am unable to follow that argument. I am bound to say that, as it appears to me, the section has been applied in a manner which is not warranted.

BAGGALLAY, L.J.:—

Agreeing entirely with what has been said by the Lord Justice, I have very few words to add. It appears to me to be clear, not only from the form in which the order is drawn up, but also from the observations which were made by the Master of the Rolls in the course of his judgment, that the misfeasance of which he considered the present Appellants to have been guilty was the non-payment of £500 in respect of the hundred shares the amount

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of the qualification for a director. No doubt, in the course of the argument, Mr. *Ince* has endeavoured to shew that there possibly may have been a misfeasance of some other character. He was driven to that from feeling, I have no doubt, that he was unable to support the particular view which the Master of the Rolls had taken. Now, if there had been any obligation upon these gentlemen to have taken these hundred shares at £5 each, then I could very well understand the Master of the Rolls holding that their not doing that which they were bound to do was a misfeasance, or at any rate a nonfeasance. But it had previously been decided, according to the decision in *Jenner's Case* (1), that the circumstances under which these gentlemen accepted office as and acted as directors, did not involve them in any contract whatever to take shares. That decision appears to me to take away the very foundation of the alleged misfeasance.

BRAMWELL, L.J.:—

It is quite unnecessary for me to express my very great respect for any opinion of the Master of the Rolls, and I am really surprised at finding I can differ from him with so much confidence as I cannot help feeling on the present occasion. No doubt the acting as a director without proper qualification is a misfeasance in the abstract, if such an expression be permissible. I do not mean to say that the Appellants were guilty of any moral wrong, but though the acts which they did as directors may have been good things, and things which ought to have been done, still if they did them, knowing that they had no right to do them, you may say that they were in the abstract guilty of a misfeasance. Supposing a man, not elected a member, were to sit and vote in the House of Commons, you might call his conduct misfeasance, however properly he voted. I think that if a man not being qualified votes in a municipal council, there is a penalty attached to it, although he may vote in the most proper way, and although what he does may be for the benefit of the corporation. But the question is not whether this conduct of the Appellants was a misfeasance in the abstract, but whether it is a misfeasance under sect. 165, and I am decidedly of opinion that it is not. Observe the

(1) 7 Ch. D. 132.

language of the section, "Where it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any moneys of the company" (all which are causes of claim which would have been enforceable in Courts of Law independently of this section) "or been guilty" (which seems to suppose some offence committed which as an honest and right-minded man he would not have committed) "of any misfeasance or breach of trust in relation to the company"—those are the cases which are within the section, and then it goes on, "notwithstanding that the offence is one for which the offender is criminally responsible" (he is always an offender, sometimes he may be criminally responsible, sometimes not), the Court may "examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just." Is it possible to hold that a man doing nothing wrong in itself, except that he acts without being qualified to do so, is within the meaning of those words? I have the strongest opinion that it is not. If he has done anything wrong as a *de facto* director, no doubt he can be got at under the clause. It seems to me that the sole object of the clause is to give a summary remedy for that for which there would be a remedy without that section in the Courts of Law. Then, again, it seems to me that the amount with which these gentlemen have been charged cannot be justified. The section authorizes the Court to direct persons chargeable under it to pay a sum of money by way of compensation. Therefore, the official liquidator has to shew, first of all, the misfeasance, and then the damage in respect of which the company is to be compensated. To my mind the liquidator has failed to shew any damage at all. This is not a section for punishing a man who has been guilty of misfeasance, but for compensating the company in respect of the loss occasioned by his misfeasance. It is not shewn that there was any loss, and indeed, if the burden of proof were upon the

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Appellants to shew there was not any loss, I should say they had succeeded in doing it. I cannot understand upon what footing these gentlemen have been made to pay £500 each. The consequence is to make them worse off than if they had taken their 100 shares apiece. I suppose that in that case they would have had to pay £500 each, but then they would have had the chance of having something returned, as there might be a surplus after discharging the liabilities of the company.

Solicitors: *Wild, Brown, & Wild; E. Beall.*

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[1878 J. 63.]

Lunacy—Capacity to contract—Delusions—Motion for a new Trial—Issue directed by Court—Rules of Court, Order XXXVI., *r.* 27; *Order* XXXIX., *r.* 1*a* (*March*, 1879)—*Practice.*

The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract: it is a question for the jury whether the delusion affected the disposition or contract.

A lessor at the time when he made a lease of a farm laboured under the delusion that it was impregnated with sulphur. On an issue directed as to the capacity of the lessor to make the lease, rational letters by the lessor relating to the lease were put in evidence. The Judge did not tell the jury that the letters did not displace the effect of the delusion, but directed them that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property though believed to be full of sulphur. The jury found that the lease was valid:—

Held, on a motion for a new trial, that there was no misdirection.

In an action for administration in the Chancery Division, an issue, whether a grant of a lease by the testator was valid, was directed to be tried before a Judge and special jury at the assizes. A motion for a new trial was allowed to be made in the Court which directed the issue, in the absence of any rule of Court directing it to be made elsewhere.

THE Plaintiff was the legal personal representative of *Thomas Price*, the testator, in the action for administration and other purposes. *Thomas Price* died in 1875. He, on the 29th of August, 1871, granted a lease of a farm called *Newton West* to the

See Jones v. Bankes 5 Ch D 279. CA

Defendant. The Plaintiff contended that the grant ought to be set aside, and on the hearing of the action an issue was directed to be tried before a jury. The question was whether *Thomas Price* was or was not of sound mind and capable of managing his own affairs at the date of the lease, and it was tried before Mr. Justice *Lindley* and a special jury at the *Caermarthenshire* assizes on the 22nd of January, 1880. There was evidence that on the 24th of April, 1874, *Thomas Price* attempted to destroy a will and codicil which he had made in 1862. In the Probate Court there was a trial before the President and a special jury as to whether *Thomas Price* was at that date competent to destroy those documents, and it was found that he was not, and they were allowed to be proved. At the trial, before a special jury in *Wales*, the Plaintiff called about twenty witnesses, including three medical practitioners, and they deposed that *Thomas Price* was in 1871 subject to various delusions, and in particular that he and various things around him, and the farm in question, were impregnated with sulphur; and some of them stated that he was not able to transact business, while others deposed that he attended fairs and markets and transacted business. For the Defendant certain letters from *Thomas Price* were produced in reference to the grant of the lease, and as they appeared to be rationally and sensibly expressed, the jury gave a verdict for the Defendant.

A motion was made before Vice-Chancellor *Hall* for a rule *nisi* for a new trial on the 4th of March, 1880.

B. T. Williams, Q.C. (*Hastings*, Q.C., and *C. C. Berkeley* with him) for the Plaintiff:—

We now move, *ex parte*, for a rule *nisi* for a new trial, on the grounds that the verdict was against the weight of evidence, and of misdirection, because the learned Judge did not tell the jury that the letters in themselves did not displace the proof of mental disease adduced by the Plaintiff. On the question whether your Lordship is the Judge before whom the motion should be brought I will refer to the case of *Hunt* v. *City of London Real Property Company* (1) and to Rules of Court, Order XXXIX., rule 1a (March,

(1) 2 Q. B. D. 605; 3 Q. B. D. 19.

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1879), which, it is submitted, abrogated the effect of the decision in that case.

Kekewich, Q.C. (as *amicus Curiæ*):—There was an action of *Williams* v. *Guest* in which an issue was directed by the Master of the Rolls, and it was tried at *Cardiff*. After the verdict a motion was made before the Master of the Rolls for a new trial, and it was heard and refused.

B. T. Williams:—Apart from any precedent, I submit that the Plaintiff is entitled, there having been no transfer of the action from this Court (Rules of Court, Order v., rule 4a (March, 1879)), to make his motion for a new trial before your Lordship, "calling on the opposite party to shew cause, at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed": Rules of Court, Order XXXIX., rule 1a (March, 1879).

HALL, V.C.:—

The precedent of *Williams* v. *Guest*, to which I have been referred by Mr. *Kekewich*, seems to me to be an authority upon which I can proceed to hear the motion. I may, however, observe that the application here for a new trial is entirely opposed to the practice in other Divisions of the Court in which the practice has been considered and acted upon. It is that the application should be made in the Divisional Court, of which the Judge who tried the case is a member; the object being to have the Judge present who tried the case, and I understand that such motions must be made when three Judges are present. I do not think that, upon the construction of the Rules of Court which have been referred to, a ground has been shewn for coming here, but in the absence of any rule directing the motion to be made elsewhere, it is made here. I have had a return made to the order directing the trial of the issue, and been furnished with the Judge's notes of the trial. There is no reference in them as to what took place in the Probate Court, and properly so, as any reference to those proceedings would have been irrelevant.

The motion was then heard, and upon the conclusion of the argument judgment was reserved.

March 24. HALL, V.C., delivered judgment as follows:—

The Plaintiff has moved for a rule *nisi* for a new trial of the issue afterwards mentioned, the grounds stated being—

1st. That the verdict was against the weight of evidence.

2nd. Misdirection, because the Judge did not tell the jury that the letters in themselves did not displace the proof of mental disease adduced by the Plaintiff.

In this action the Plaintiff, the representative of one *Thomas Price*, seeks to set aside a lease purported to have been granted by *Price* to the Defendant on the 29th of August, 1871, of a farm called *Newton West*, at a rent of £110, in which lease a surety for the lessee joined. The lessee entered into possession at once, and has since continued to hold under the lease. The lessor died in 1875. On the 24th of April, 1874, he attempted to destroy a will and codicil he had made in the year 1862, and on a trial after his death, before Sir *Robert Phillimore*, as to whether he was, on the 24th of April, 1874, competent to destroy the will and codicil, it was found that he was not, and the will and codicil were proved. In that trial the question was as to the testator's capacity on the 24th of April, 1874, and the finding of incapacity then, of course, does not prove the testator's mental incapacity on the 29th of August, 1871.

I may mention that in the present action other questions than that above mentioned have been raised as being a bar to the Plaintiff's title to relief. The Defendant desired all the questions to go to a jury, but after discussion before me it was considered that the only question which should, at all events at present, be sent to a jury was the question of the testator's capacity on the day of the date of the lease to grant the lease in question, and accordingly in order to try that question an issue was sent to be tried at the assizes, and came on for trial by a special jury at *Caermarthen* on the 22nd of January, 1880, before Mr. Justice *Lindley*. The issue was, whether *Thomas Price* was or was not of sound mind and capable of managing his own affairs on the 29th

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of August, 1871, that being the common form of issue in such a case. The object being to try the validity of the lease, the real question to be tried, and which was actually tried, was whether *Price* was competent to grant the lease, in other words, whether he could dispose of the farm in question, so far as granting the lease. The Plaintiff called about twenty witnesses, including three medical men who visited *Price* in March, 1871, at *Clyne*, where he was then residing. The medical witnesses concurred in considering that *Price* was, when they saw him, not able to transact business, and that his mind was then perverted, and he was incapable of taking care of himself. Mr. *Brown*, one of the three, said he had known just as absurd delusions as these co-exist with general sanity, and Mr. *Phillips* said delusions may exist with sanity generally. These three medical witnesses clearly proved that *Price* was, when they saw him, labouring under delusions; these were various, and in fact, as was proved, dated from some time in 1866, one being that he and others and things around and about him were impregnated with sulphur, the testator taking many steps for getting rid of the sulphur, such as taking or administering castor-oil in large quantities, boring holes in doors or buildings, and pulling down buildings on *Newton West Farm*, ploughing up part of the land of that farm, selling some of his stock which he considered impregnated with sulphur, and that at an undervalue, persuading his manager, *Daniel James*, to sell two cows of his (*James'*) because they had sulphur, &c., and giving him two other cows for doing so. There was evidence that *Price* left *Newton Farm*, considering it was, on account of the sulphur, no longer habitable by him. Others of his delusions were that devils were always tormenting him, that his life was being sought, &c. I should mention that it appeared that notwithstanding these delusions, *Price* attended fairs, but it would rather seem that during 1871 a man in his employ made the bargains.

A Mr. *Worthington*, a J.P., says he did not consider *Price* sound in his mind, that he attended fairs, and that witness bought cattle from him at market; that *Price* was sane in that respect, and a good hand at bargaining.

A Mr. *Harris*, J.P., says *Price* attended fairs and managed his business there, that he was a sharp man after his own interests.

On the whole evidence for the Plaintiff it must be taken that when the lease was granted *Price* was labouring under the delusions, and that that as to sulphur had reference, *inter alia*, to *Newton West Farm*, and there can be no question that upon the Plaintiff's case being closed the jury were with the Plaintiff, and prepared without hesitation to find a verdict in his favour. The Defendant's counsel thereupon opened the Defendant's case, and in doing so he read several letters from the Defendant, written in reference to the drawing up of the lease, which were addressed to his solicitor Mr. *Matthias*, who drew up the lease. These letters, which were read to me, and which may be treated as here read, were so rational and sensible, not indicating anything from which it could be supposed that the writer was not otherwise than fully competent to negotiate for and arrange the granting of a lease of *Newton West Farm*, that it was thought proper to ascertain whether or not they were *Price's* own compositions. It was, however, admitted that they were. The impression made by these letters upon the jury was such that, after the Defendant's counsel had proceeded only a short way further, they intervened, and then the Plaintiff's counsel said, "Notwithstanding the letters, I should be prepared to contend that he was not of sane mind in 1871." He was invited to further address the jury, but he elected not so to do. The Plaintiff has (by those representing him) throughout taken this view of his case, viz., that the delusions being shewn to exist up to and during the time when the lease was negotiated and executed, the Plaintiff was entitled to the verdict.

In the argument before me it was contended that delusions being shewn once to exist a contract was void, unless it were shewn (the *onus* being on the party insisting on the contract) that the delusions had ceased. I was referred to the law as laid down in *Waring* v. *Waring* (1) as establishing the Plaintiff's contention, and Lord *Penzance's* judgment in *Smith* v. *Tebbitts* (2) was relied on as also establishing that contention. It was also said, not without some foundation, that Sir *R. Phillimore* at the trial before him as to the validity of the destruction of the will and codicil, took the same view of the law. I do not hesitate to say that the doctrine laid down in those cases and now relied on by the Plain-

(1) 6 Moo. P. C. 341. (2) Law Rep. 1 P. & M. 398.

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tiff in this case is not now law. It has been overruled by *Banks* v. *Goodfellow* (1), which supported the direction given at the trial by Mr. Justice *Brett*, and which has been followed by Sir *James Hannen* in *Boughton* v. *Knight* (2) and in *Smee* v. *Smee* (3). I hold it to be now settled law, and that until the contrary shall have been decided by the House of Lords, it must be considered that the mere existence of a delusion is not sufficient to deprive a party of testamentary capacity; and the rule having been applied for on the grounds I have mentioned, I think the rule cannot be granted on either of those grounds. As to the cases of *Waring* v. *Waring* (4) and *Smith* v. *Tebbitts* (5), it is stated in *Banks* v. *Goodfellow* that it was palpable that the delusions must have influenced the testamentary disposition. It was in the course of the argument before me said that *Banks* v. *Goodfellow* was only applicable where the delusion was wholly unconnected with the subject-matter of the disposition. I do not find the rule of law laid down with this qualification, although no doubt in the course of the judgment the disposition being wholly unconnected with the delusion, and the delusion not being calculated to influence the particular disposition, were mentioned. It is manifest that where the delusion is connected with the disposition, such connection may in some cases shew beyond question that the testator had not testamentary capacity, whilst in other cases, if not in itself conclusive against testamentary capacity, it might have much weight in determining the point. I have not, however, to determine whether in every case where a delusion exists which is connected with the thing disposed of there can or cannot be testamentary capacity to dispose of that thing. The delusion may be trivial, and whether so or not the conviction of a jury or Judge may, unless forbidden by law, be that it did not affect the disposition. What the conclusion in such cases should be I have not to determine. Where the question is as to testamentary capacity the testator must have been of sound mind, memory, and understanding; and it appears from the judgment of Sir *James Hannen* in *Boughton* v. *Knight*, and from other cases, how many

(1) Law Rep. 5 Q. B. 549.
(2) Ibid. 3 P. & M. 64.
(3) 49 L. J. (P. & M.) 8.
(4) 6 Moo. P. C. 341.
(5) Law Rep. 1 P. & M. 398.

matters have to be weighed and considered. In *Boughton* v. *Knight* (1) Sir *J. Hannen* says, as to a contract, "the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into." The learned Judge is said to have misdirected the jury because he did not tell them that the letters in themselves did not displace the proof of mental disease adduced by the Plaintiffs; in other words, that he should in substance have told them that there being the delusions, and they not being shewn by evidence other than the letters to have been removed, that their verdict must be for the Plaintiff: this contention being dependent upon the adoption of the law as laid down in *Waring* v. *Waring* (2) and the other two cases relied on by the Plaintiff. I hold that there was not any such misdirection as is alleged. The jury were fully aware of and alive to the existence of the delusions at the time of the contract, and that one of them related to the farm in question. It was not urged before me that in summing up the learned Judge should have dwelt upon or drawn special attention to these delusions as existing at the date of the contract, or to one of them being a delusion affecting the property in question. But I am satisfied that under the circumstances it was needless so to direct or draw attention, and that the jury must have taken into consideration whether the delusion having reference to the farm would not or might not have operated upon the lessor in entering into the contract. I may here state that the learned Judge, in a memorandum which I find at the foot of a copy forwarded to me of his notes of evidence, states that he mentioned to the jury that the question was a practical question whether he was so insane as to be incompetent to manage his own affairs in the sense of disposing of his property, and even of property believed by him to be full of sulphur. I give my judgment, however, without taking this memorandum into account. The learned Judge thinks the verdict was quite right, and I think that there is not any ground for granting a rule. The application is therefore refused.

From the copy of the Judge's notes with which I have been furnished, and all of which I have read, it appears that, in addition to the evidence I have mentioned, the Plaintiff gave evidence to prove

(1) Law Rep. 3 P. & M. 72. (2) 6 Moo. P. C. 341.

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that the tenant had got the lease at an undervalue. This evidence was not called to my attention in the application made to me, and that being so I do not go into it now, and my judgment is not influenced by it. If, however, the Plaintiff thought this letting at an undervalue was established on this evidence, he would, I should think, have brought the evidence forward as material in reference to the testator's capacity, and it may be thought that, it not being brought forward, it was considered that the Plaintiff's case could not be made better, and might be damaged by it. However, my judgment is not influenced by what I have here said.

C. A.

April 24. *B. T. Williams*, Q.C. (*Hastings*, Q.C., and *C. C. Berkeley*, with him) this day applied to the Court of Appeal, *ex parte*, by way of appeal from the refusal of the Vice-Chancellor for a rule *nisi* for a new trial upon the same grounds.

THE COURT (*Jessel*, M.R., *Baggallay* and *Bramwell*, L.JJ.) granted a rule.

May 5. *De Castro*, and *Bowen Rowlands*, now shewed cause:—

The application for a new trial should have been made to a Divisional Court at *Westminster*, of which the Judge who tried the issue is a member. The practice is governed by Order XXXIX.

[JESSEL, M.R.:—Suppose you are right, what is the good of insisting on the objection? It will only put the parties to the expense of beginning all over again. If they applied to the Divisional Court and the application was refused, they would come here again, and we should grant the rule again.]

The objection was then withdrawn, and the case was argued on the merits on the evidence.

B. T. Williams, Q.C., *Hastings*, Q.C., and *C. C. Berkeley*, in support of the rule.

JESSEL, M.R.:—

The application that is made to us in this case for a new trial is made under very peculiar circumstances. I am not going to say

whether I should or should not have given the same verdict as the jury have given in this case; by which I must not be understood to intimate that I should not have given the same verdict. The only real question which the jury had to try, whatever the form of the issue, which was thoroughly understood by both sides, was whether Mr. *Price*, on a given day in the month of August, 1871, was competent to manage his own affairs in the sense of being competent to grant a lease of a certain farm for a certain number of years. That was the real question, and although the form of the issue might lead to comment, it being in general terms, both parties treated that as being in fact, as it was, the real question in issue.

Then, what was the position of the Judge as regarded the trial? We are asked to say that there was misdirection in his charge to the jury. I have read what he did say more than once. I agree that if it had been a case in which all the evidence had been gone through, and in which the jury had not expressed their opinion, and stopped the case as they did, it might have been well for the learned Judge to have explained the law a little more fully than he did. The sin, if any, that is complained of is a sin of omission. I cannot find that the learned Judge told the jury anything that was wrong; but it is suggested that he should have told them that *Price* was not competent to manage this business unless he was free from delusions as connected with the farm in question, and that he was not free from those delusions because he thought the farm was impregnated with sulphur. I am not prepared to say that he was bound to tell the jury all that under the particular circumstances of this case; for it must be recollected, that although a man may believe a farm to be impregnated with sulphur and not fit for himself to live in, he may still be a shrewd man of business, and may even believe that the other side may not know of the impregnation of the farm with the sulphur, and that in consequence he may get a higher price for it than if it was known that it was so impregnated. He may have been perfectly right in his conclusion upon that subject, and the jury may have thought that it was so. The Judge, in fact, says that he was a shrewd man of business. The jury afterwards assent to that proposition on the strength of certain letters which were read to them; and

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therefore I do not think that you can say that there was any misdirection, or, at all events, anything wrong in what the learned Judge said, and that is the material point under the *Judicature Act;* because, even if there was misdirection, it must be such a misdirection as would have had a material effect in the result. I am satisfied that if the learned Judge had told the jury all that Mr. *Williams* has suggested he ought to have told them, the result would have been the same; and therefore, having regard to the new rule—and it is a most useful rule—which has been introduced by the *Judicature Act,* namely, that it is not a matter of right on the part of the Court to grant a new trial, even if there were a technical misdirection, even if there be an improper reception of evidence, unless the Court or the Judge thinks that it might have materially affected the result, I am of opinion that on the question of misdirection there should be no new trial granted.

[His Lordship then considered the question whether the verdict was against the weight of the evidence, and concluded as follows:—]

Recollecting that the verdicts of juries are not to be set aside capriciously by Courts of Justice, that they are of great weight and importance, and that we have here the concurrence of both those learned Judges I have mentioned, and, as far as I am concerned, I cannot say that they were wrong in the conclusion to which they have come, although I am not quite sure that I myself should have arrived at the same conclusion, yet I think we ought not only to be satisfied that they are wrong, but that they are so manifestly and clearly wrong that there has been a miscarriage of justice, before we ought to expose the parties to the risk, delay, and annoyance of a new trial.

I will only add one word in conclusion, which is, that I cannot believe for a single moment that if you had the same or a similar Judge to preside and a similar jury on a second trial, that they would arrive at any different conclusion from that which the jury have arrived at in the present instance. I do not say that that is conclusive; it is a mere expression of opinion on my part; but that being so, I think the right order to make in this case is to discharge the rule.

BAGGALLAY, L.J.:—

Assuming that *Price* was subject to certain insane delusions, as to which I think there can be no doubt, having regard to the admitted evidence in this case, that is not a sufficient reason, in my opinion, why he should be held to have been incompetent to execute the lease in question, if the jury were satisfied that the delusions to which he was subject had not so far affected the general faculties of his mind as to render him incompetent to deal with the property which was the subject of the lease. I think that the opinion which I have thus expressed is in accordance with the general principles enunciated by the President of the Probate Division in the case referred to of *Smee* v. *Smee* (1), and to which I entirely assent.

I propose to add but very few words to what has fallen from the Master of the Rolls; the question for consideration is, what influence had the insane delusions by which *Price* was affected upon the particular transaction in respect of which it is alleged that he was incompetent to act? Upon that we have the five letters to which so much reference has been made; those letters were read to the jury, were proved to have had reference to the particular transaction, and from them the jury inferred, and the Judge agreed with them, that they afforded abundant evidence that there was not that incompetency on the part of *Price* to deal with his own affairs which was alleged on the other side.

The jury having so found, the Judge who tried the action agrees, as to the effect of that evidence, with the jury; and the Judge, for the satisfaction of whose conscience the question was sent to be tried by a jury, being also satisfied with what has taken place, I do not think it is a case in which we could possibly interfere.

BRAMWELL, L.J.:—

I am of the same opinion.

I think there was no misdirection. I think my brother *Lindley* was right in giving the jury some direction, because if he had not it might have been said the jury are going to give a verdict, but,

(1) 45 L. J. (P. & M.) 8. 5 P D 84

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for aught we know, on wrong principles. It might have been said that he had not sufficiently assisted them.

It seems to me that the direction which he gave to them was, as might be expected from him, quite right, because what he says is, "It is a practical question—whether he was so insane as to be incompetent to manage his own affairs in the sense of disposing of his property, and even of property believed by him to be full of sulphur."

Now, I do not know but that some acute persons might be able to frame a special demurrer to that, but I cannot find the ground for it myself. I think it was the right question to leave to them.

Then was it a verdict against the evidence? Upon that point the Court of Appeal, as we have often had to say at *Westminster*, ought not to grant a new trial except upon the most cogent considerations, because they cannot do so without holding that the jury and the Judge at the trial and the Divisional Court, or, as in this case, Vice-Chancellor *Hall*, are all in the wrong in what they have done. Therefore we ought to have a very strong case indeed before we interfere. In this instance I think we have a very strong case the other way. [His Lordship then referred to the evidence, and concluded by expressing his opinion that the verdict was a right verdict.]

Solicitors for Plaintiff: *Smith, Davies, & Co.*
Solicitors for Defendant: *G. L. P. Eyre & Co.*

In re RUTHERFORD.
BROWN *v.* RUTHERFORD.

[1879 R. 41.]

C. A.
1880
V.-C. H.
March 23.
C. A.
May 25.

Statute of Limitations—Promissory Note payable Three Months after Demand—Demand—Payment of Interest.

In May, 1857, *J. R.* gave to *R. R.* a promissory note for payment of £150 three months after demand, no interest being reserved. *J. R.* died in 1869, and *R. R.* in 1878. The note was in *R. R.*'s possession at his death, and he had indorsed upon it receipts in November, 1857, and August, 1858, each for half a year's interest. It appeared that no other interest had ever been paid. *J. R.*'s estate being administered by the Court, *R. R.*'s executor claimed to prove on the promissory note:—

Held, by *Hall*, V.-C., the claim must be allowed for £150, with interest from May, 1858:

Held, on appeal, that the admissions by the payee of the payment of interest were evidence of a demand having been made in 1857 so as to make the £150 immediately payable, and that the *Statute of Limitations* was a bar to the claim.

Semble, that, apart from the *Statute of Limitations*, the claim ought to have been rejected as a stale demand.

THIS was a summons by the Plaintiff for the opinion of the Judge in a creditor's suit whether the Plaintiff, in addition to a debt which he had established, was not also entitled to prove in respect of a promissory note.

The note in question was given by *John Rutherford*, the testator in the cause, to *Robert Rutherford*, and was as follows:—

"May 20, 1857.

"Three months after demand I promise to pay to Mr. *Robert Rutherford* the sum of £150 for value received in book debts.

"*John Rutherford.*"

Upon this note *Robert Rutherford* had made the following indorsements:—

"Interest 12 November, 1857 . . . £3 15*s.*
Do. 12 August, 1858 . . . . 3 15."

John Rutherford died in 1869, and *Robert Rutherford* in 1878.

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The Plaintiff was the legal personal representative of *Robert Rutherford*, and the present action was brought in the year 1879.

The Plaintiff deposed that *Robert Rutherford* had delayed enforcing payment of the note on account of his relationship to and friendship for *John Rutherford*, and also on account of *John Rutherford's* embarrassed circumstances.

The Defendant, the executor of *John Rutherford*, deposed that he believed the note to have been satisfied in or about 1859 by an arrangement between *Robert* and *John Rutherford*, and that from the death of *John Rutherford* in 1869, to that of *Robert Rutherford* in 1878, no interest had been paid to or demanded by *Robert Rutherford*.

The Plaintiff, in reply, deposed that the note had always remained in the hands of *Robert Rutherford* who, as the Plaintiff knew, had always believed that he could at any time enforce payment of it.

The summons came on for hearing before Vice-Chancellor *Hall* on the 23rd of March, 1880.

John Henderson, for the Plaintiff, in support of the summons:—

The note in this case is not payable on demand, but "three months after demand." And when that is the case, as is well settled, the *Statute of Limitations* does not begin to run until a demand for the payment of the principal has been actually made. The burden of proving such demand lies upon the person who sets up the statute, and there is no evidence that any such demand ever was made before the commencement of this action.

Caldecott, for the Defendant:—

Payment of interest is admitted by the Plaintiff, and payment of interest is as between the parties sufficient evidence that a demand for the principal has been made so as to cause the statute to run: *Bamfield* v. *Tupper* (1). Interest though payable from the date of the note, is not enforceable until demand. The payment of interest was an admission, not only on the part of the giver of this note, that the debt was ripe for recovery, but also as against the holder that he was dealing upon the footing of its

(1) 7 Ex. 27.

being a debt recoverable by him. For interest is in fact only something paid for forbearance, and the person who receives as well as the person who pays the interest is precluded from saying that no demand has been made.

Irrespective of the statute, however, there must be some time after the lapse of which the law will presume that a demand has been made, and then the burden of proof is removed. Suppose this note had been dated 100 years back, would the burden have been on us to shew demand or satisfaction? Here the note was more than twenty years old before it was put in suit, and after such a lapse of time demand or satisfaction will be presumed, and the onus is thrown back on the Plaintiff.

John Henderson, in reply:—

In *Bamfield* v. *Tupper* (1) the note was papable "on demand," a different rule applies when the note is payable at a fixed period after demand: *Thorpe* v. *Booth* (2); *Christie* v. *Fonsick* (3); *Holmes* v. *Kerrison* (4); *Byles* on Bills (5).

HALL, V.C.:—

I am of opinion first, that this being a note payable three months after demand, time does not run under the *Statute of Limitations* until demand has actually been made; and secondly, that the payment of interest which is here relied on is no proof of demand.

It is not disputed that interest was payable at some time or other, in respect of this debt as from the date of the note, and I cannot agree with the contention that, because the interest was running, and demand was not made so as to enable the holder to recover on the note, the maker of the note might not, during the time it was so held without the principal being demanded, properly pay, as I think in the ordinary case he would pay, interest from time to time, although payment of the principal had not been demanded. In fact, to pay the interest is the very thing which

(1) 7 Ex. 27.
(2) Ry. & M. 388.
(3) Sel. N. P. 9th Ed. p. 351.
(4) 2 Taunt. 322.
(5) 12th Ed. p. 345.

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the party would do for the purpose of staving off or preventing the demand.

The case of *Bamfield* v. *Tupper* (1) is not in fact any authority upon the point on which it was cited, for there the note was a note payable on demand, and not at a particular period after demand, and therefore, so far as the *Statute of Limitations* is concerned, the money was payable at once. It is with reference to that, that the remark of *Platt*, B., in *Bamfield* v. *Tupper* must be read, where he says, "The payment is clearly an admission that the debt was then due upon which the payment of interest was made," it being borne in mind that in that case the note was payable on demand, or, for the purposes of the *Statute of Limitations*, immediately. It appears to me, therefore, that these objections cannot prevail.

Further, I cannot hold, as was contended, that the fact of the note being more than twenty years old, is a fact from which the Court can presume satisfaction of it, in the absence of any proof of demand having been made.

Taking into account the fact that interest was paid down to 1858 and no further, as a circumstance favourable to the person resisting payment, and bearing in mind, that here is the note still held by the person claiming under it, whereas it would have been given up if the money had been paid, I certainly cannot in the present case make any such presumption. I look upon these payments as having taken place without any demand for the principal having been made. The claim must be allowed with interest at five per cent. from the date of the last payment in 1858.

C. A. The executor of *John Rutherford* appealed. The appeal was heard on the 25th of May.

Caldecott, for the Appellant :—

Independently of the *Statute of Limitations*, a bill or note twenty years old is presumed to have been paid if there has been no payment or acknowledgment in the meantime : *Byles* on Bills (2). Where there is no note, a lapse of thirteen years has

(1) 7 Ex. 27. (2) 12th Ed. p. 362.

been held sufficient to raise a presumption of payment. The *Statute of Limitations*, moreover, is a bar, for payment of interest must be taken as sufficient proof of a demand, interest being paid for forbearance of a sum presently payable. The Vice-Chancellor thought that interest was paid in order to stave off the making a demand, but *Bamfield* v. *Tupper* (1) shews that it is evidence of a demand having been made.

John Henderson, for the Plaintiff:—

I submit that the proper view of the facts is that taken by the Vice-Chancellor, that the demand was postponed in consequence of the payment of interest, and that the interest was paid under a separate collateral agreement, the note not making interest payable. The case of *Bamfield* v. *Tupper* is not analogous; it was there held against the debtor that the payment of interest took the case out of the *Statute of Limitations*. It was not held that it was evidence of demand, for the note being payable on (and not a certain time after) demand, no demand was necessary.

JESSEL, M.R.:—

I am of opinion that this appeal must be allowed. Considering what has occurred and the time that has elapsed, I think that payment is to be presumed. The maker of the note died in 1869, the payee in 1878, and during the whole of that interval no demand was made for principal or interest on this note. Now whatever relationship or friendship there was between the maker and the payee, which might lead the payee to postpone the enforcing of the note, ceased on the death of the maker. The note was payable three months after demand, and was dated in May 1857. Nothing has been received under it except two payments of interest made in 1857 and 1858, the fact of which payments appears from indorsements made by the payee on the note. These indorsements import that a demand had been made, for the payment of interest implies that a debt is due, interest being paid for forbearance of a debt. It is true that the interest is wrong in amount, for it appears to have been treated as running from the date of the note, but that error is not sufficient to rebut the con-

(1) 7 Ex. 27.

C. A. 1880 *In re* RUTHERFORD. BROWN *v.* RUTHERFORD.

clusion from the payment of interest that a demand had been made, so as to make the principal payable. On this ground I am of opinion that the *Statute of Limitations* is a bar, but I wish to guard myself from being supposed to say that if there had been no evidence of payment of interest, this demand ought not, after the lapse of twenty-two years, to be rejected as being a stale demand. The Lord Justice *Cotton*, who was obliged to leave the Court on public business at the close of the argument, authorizes me to say that he concurs in the conclusion that this claim must be rejected.

JAMES, L.J.:—

I am of the same opinion. It appears to me impossible to distinguish this case from *Bamfield* v. *Tupper* (1), where the Court held that the payment of interest was an acknowledgment that the money was due, and here the acknowledgment by the payee that interest was paid is an acknowledgment by him that the money was payable, and that there had been a demand. It is true that there was a mistake as to the amount, but an intelligible mistake, and one which no doubt was in accordance with the honesty of the transaction, the parties having in all probability intended that the amount should bear interest. I am of opinion that at any time after the 12th of November, 1857, an action might have been brought without any further demand, and on this ground, independently of the other ground taken by the Master of the Rolls as to which I entirely concur with him, I am of opinion that the claim is barred.

Solicitors: *Henderson & Buckle; Shum, Crossman, Crossman, & Pritchard.*

(1) 7 Ex. 27.

Ex parte SYMMONS. *In re* JORDAN.

C. A.
1880
C. J. B.
Feb. 21.
C. A.
June 3.

Bill of Sale—Apparent Possession—Fraudulent Preference—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.

If the grantee under an unregistered bill of sale has, before the bankruptcy of the grantor, acquired possession of the goods so as to exclude the apparent possession of the grantor, it is immaterial whether the possession has been obtained by means of a transaction which, taken *per se*, would have amounted to a fraudulent preference.

Decision of *Bacon*, C.J., reversed.

Per *James*, L.J.: Observations on *Darby* v. *Smith* (1).

ON the 12th of April, 1878, *Charles Symmons* and *Theophilus Hewitt*, drapers at *Maidenhead*, at the request of *T. J. Jordan*, an auctioneer and furniture dealer at the same place, joined with him in signing a promissory note for £259 7*s.* 6*d.* in favour of *George Wethered*, to secure money advanced by *Wethered* to *Jordan*. On the same day, as an inducement to *Symmons & Hewitt* to sign the promissory note as his sureties, *Jordan* executed a deed by which, in consideration of the liability incurred by them to pay the £259 7*s.* 6*d.*, he covenanted with them that he would pay the promissory note when it should fall due, and indemnify them from all liability thereunder. And *Jordan* also by the same deed assigned to *Symmons & Hewitt*, their executors and administrators, the stock-in-trade, household furniture, goods, chattels, fixtures, effects, and things then in or about, or which, before the satisfaction of the security thereby created, should be in or about, the house and premises in *Maidenhead* occupied by *Jordan*, and the lease of the premises, and the goodwill of the businesses carried on by *Jordan* thereon, and his book debts in relation to those businesses; provided that, on satisfaction of the foregoing covenant, *Jordan*, his executors, administrators, and assigns, should be entitled to a reassignment of the premises and of the lease. And there was a further proviso that any person or persons for the time being entitled to the benefit of the security might, on breach of any covenant therein contained on the part of *Jordan*, his executors, administrators, or assigns, or if

(1) 8 T. R. 82.

C. A. 1880 — *Ex parte* Symmons. *In re* Jordan.

such person or persons as aforesaid should at any time find or discover anything which should reasonably lead him or them to doubt or suspect the solvency of *Jordan*, seize and sell the premises, and upon every sale (or attempted sale) and assurance thereof, might deal with the premises and the purchase-moneys thereof as absolute owners or owner. Provided that the purchase-money should be paid (after discharging all expenses and all moneys for the time being owing on or in relation to the promissory note) to *Jordan*, his executors, administrators, or assigns. This deed was not registered as a bill of sale.

On the 14th of April, 1879, *Symmons & Hewitt* went to *Jordan's* place of business and selected various articles of furniture, part of those which were comprised in the bill of sale, which were invoiced to them as purchasers at the price of £104 13*s.* 10*d.*, and were immediately afterwards sent by *Jordan* to their place of business. The £104 13*s.* 10*d.* was not paid, and was not intended to be paid, but was set off against the liability of *Symmons & Hewitt* on the promissory note, which was to fall due on the 15th of April. *Jordan* was then in pecuniary difficulties. Some writs had been issued against him, and he had informed *Symmons & Hewitt* of this fact, and had told them that he did not think he should be able to pay out the writs, and that he should be unable to meet the note; and he told them that they had better do what was legal in the matter. The result of this communication was the above arrangement for a nominal sale of the articles of furniture valued at £104 13*s.* 10*d.*, and their removal. On the 16th of April *Symmons & Hewitt* paid the promissory note. On the 19th of April, 1879, *Jordan* filed a liquidation petition in the *Windsor* County Court, and on the 12th of May he was adjudicated a bankrupt. The trustees in the bankruptcy applied to the County Court for an order that *Symmons & Hewitt* should deliver up to them the furniture which they had obtained from the bankrupt, or should pay the £104 13*s.* 10*d.* The Judge was of opinion that the bill of sale was not acted upon, but that the delivery of the furniture by the bankrupt to *Symmons & Hewitt* on the 14th of April was a voluntary effort on his part to assist them to the detriment of his other creditors, and that the transaction amounted to a fraudulent preference. His Honour accord-

ingly made the order asked for. *Symmons & Hewitt* appealed to the Chief Judge.

C. A. 1880 *Ex parte* SYMMONS. *In re* JORDAN.

The appeal was heard on the 24th of February, 1880.

Winslow, Q.C., and *A. Beddall*, for the Appellants:—

It is difficult to see how this transaction can be impeached. It is not an act of bankruptcy. It cannot be affected by the *Bills of Sale Act*, because the goods were taken away by the mortgagees. The goods cannot be held to have been in the bankrupt's order and disposition, for they were not in his custody. Nor can it be a fraudulent preference. The mortgagees had a right to take the goods, and they did so: *Ex parte Topham* (1).

De Gex, Q.C., and *Robertson Griffiths*, for the trustees, were not called upon.

BACON, C.J.:—

In my opinion there was never a clearer case than this in all the world.

The transaction was clearly a violation of the policy of the law in bankruptcy. The debtor being in difficulties tells these particular creditors that he is so, and advises them to do the best they can for themselves.

The sale was a sham sale. The debtor, knowing he could not pay his creditors, hires a van, and sends away a part of his property, thus preferring in most distinct terms these particular creditors.

The appeal must be refused with costs.

From this decision *Symmons* and *Hewitt* appealed. The appeal was heard on the 3rd of June, 1880. C. A.

Winslow, Q.C., and *A. Beddall*, for the Appellants:—

The Appellants were only taking possession of goods which were their own property under the bill of sale; there could not be a fraudulent preference. At the time of the bankruptcy the goods were not in the apparent possession of the grantor, and therefore the *Bills of Sale Act* does not apply.

(1) Law Rep. 8 Ch. 614.

C. A. 1880 *Ex parte* SYMMONS. *In re* JORDAN.

[COTTON, L.J.:—Has it ever been suggested that telling a man to take what is his own property is a voluntary preference?

JAMES, L.J.:—Or that sending goods away to the true owner in order that they may not remain in the vendor's order and disposition, is a voluntary preference?

De Gex, Q.C., referred to *Darby* v. *Smith* (1).]

If the present decision is right, the grantor of a bill of sale could always prevent the grantee from taking the goods out of his order and disposition by simply saying, I am going to file a liquidation petition.

De Gex, Q.C., and *Robertson Griffiths*, for the trustees:—

The right to seize under the bill of sale had not arisen. Moreover, the right to seize is in fact given in the event of the bankruptcy of the grantor, and such a stipulation is void as a fraud on the bankrupt law: *Higinbotham* v. *Holme* (2).

[THESIGER, L.J.:—The execution of the bill of sale was not postponed until the grantor should be in difficulties; only the right to seize was postponed.

JAMES, L.J.:—The property in the goods passed at once.]

But the right to seize had not arisen. It was in effect a provision that the goods should remain in the order and disposition, or the apparent possession, of the grantor, until the eve of his bankruptcy: *Darby* v. *Smith*.

[JAMES, L.J.:—The power given was only an additional one; there are no negative words in the clause.]

If none of the events mentioned had happened they would not have been justified in taking possession. They could not get into the grantor's shop without his concurrence.

[JAMES, L.J.:—The shop was assigned to them also. They might walk in if they could do so peaceably.]

They did not intend to act under the bill of sale, but under the new contract to buy the goods, and that clearly amounted to a fraudulent preference. The possession thus acquired was wrongful.

(1) 8 T. R. 82. (2) 19 Ves. 88.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge cannot be sustained. It seems to me that there is a fallacy in the claim of the trustees. They seek to impeach the title of the holders of the goods. But the goods are their goods, and the trustees must shew some title to them as the goods of the bankrupt. I will assume that the sale would not have given the Appellants any title to the goods, that it would have amounted to a voluntary preference. But, putting that aside, we have this fact—the goods were the goods of the persons in whose possession they were. Independently of the bankrupt law or of the *Bills of Sale Act*, they were not the goods of the bankrupt at the commencement of the bankruptcy, and not being his goods at that moment, how did they become the goods of the trustees? It could only be by their having been in the order and disposition, or the apparent possession, of the bankrupt at the time of the bankruptcy. But they were neither in his order and disposition nor in his apparent possession, and, that being so, they do not come within the provisions of the *Bankruptcy Act* or the *Bills of Sale Act*. The appeal must therefore be allowed.

COTTON, L.J.:—

I am of the same opinion. The goods in question were in the actual possession of *Symmons & Hewitt* at the time of the filing of the liquidation petition. How do the trustees make out their title? The goods had been assigned to *Symmons & Hewitt*. But it is said that their possession was wrongful, because it was acquired by what, for the purpose of my judgment, I will assume was a fraudulent preference. But the *Bills of Sale Act* avoids the title of the grantee only as regards goods which are at the time of the bankruptcy in the apparent possession of the grantor. The goods now in question were not in the apparent possession of the bankrupt at that time; they were in the exclusive possession of *Symmons & Hewitt*. And, though *Symmons & Hewitt* could not acquire any title to them under the sale, the trustees cannot make out any title to them, because, at the time of the bankruptcy, they were not in the possession, or apparent possession, of the bankrupt. Therefore the title of the grantees under the bill of sale must prevail.

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THESIGER, L.J. :—

I am of the same opinion. If the evidence which has been given in the present case had been given in a case in which there had been no bill of sale, I think it would have warranted the Judge of the County Court in holding that there was a fraudulent preference. But here there was a bill of sale, and we must hold that by it the property in the goods passed to the grantees, for there is no evidence to the contrary. The trustees claim the goods. The bill of sale is produced, it appears to be a valid bill of sale, and the goods are in the possession of the grantees. On what ground can the trustees claim the goods? Not under the *Bills of Sale Act*, for the goods were not at the time of the bankruptcy in the possession or apparent possession of the grantor. I cannot see how the transactions relating to the sale, reading them as unfavourably as possible to the grantees, can affect their title. The objection which is made might have been made with equal force if the bill of sale had been registered. It is founded on this, that the possession was not taken under the bill of sale, but under a new arrangement between the grantor and the grantees. When the facts are looked at, it appears to me that there is no foundation at all for the argument. The goods were seized for the purpose of being taken *pro tanto* in payment of the amount which was due under the bill of sale. I can see no ground whatever for impeaching the title of the grantees. The appeal must, therefore, be allowed.

JAMES, L.J. :—

I wish to add that the case of *Darby* v. *Smith* (1), so far as it is intelligible at all, appears not to have been a case of voluntary preference. It was not like any other case which can well happen.

Solicitor for Appellants: *C. J. Mander.*
Solicitors for Trustees: *Fletcher, St. Paul, & Co.*

(1) 8 T. R. 82.

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[1878 C. 415.]

Mortgages—Building Society—Default on one Mortgage only—Right of Consolidation.

In 1871, *V.*, being the owner of shares in a building society and entitled to an advance in respect thereof, conveyed property to the trustees to secure the sum advanced, with provisoes for redemption, and that if he paid them the sum, named, monthly for twelve years, and all sums which might become due on the shares, the security should determine and the trustees should indorse a receipt on the deed.

In 1874, *V.* and *N.*, co-partners, being the owners of shares in the society, and entitled to an advance in respect thereof, conveyed partnership property to the trustees to secure the sum advanced, with provisoes for redemption, and that if they or either of them paid the sum, named, monthly for fourteen years, and all sums which might become due on the shares, the security should determine, and the trustees should indorse a receipt on the deed.

In 1875, *V.* and *N.* as debtors, and *V.* as surety, conveyed to their bankers part of the property comprised in the deed of 1871, to secure all moneys due from the firm.

V. and *N.* went into liquidation and trustees were appointed thereunder. Default was made in payment of the monthly instalments secured by the deed of 1874, and arrears became due to the society.

The bankers entered into possession and receipt of the rents of the property mortgaged to them. They paid to the society the monthly instalments secured by the deed of 1871, and in 1878 gave notice to the trustees of the society that they, in accordance with the rules of the society, desired to redeem the property comprised in the deed of 1871, but the trustees refused to allow them to do so unless they also redeemed the mortgage of 1874, and brought an action for a declaration that they were entitled to consolidate their securities :—

Held (reversing the decision of *Hall*, V.C.), that consolidation only applies where default has been made on all the securities in respect of which it is claimed; and that therefore as there had been no default on the 1871 mortgage the Plaintiffs were not entitled to the consolidation they claimed.

The principles of consolidation discussed and explained.

Selby v. *Pomfret* (1) explained.

Per James, L.J. :—There can be no consolidation between a mortgage by *A.* for his own debt, and a mortgage by *A.* and *B.* of other property for their partnership debt.

Beevor v. *Luck* (2) questioned.

SPECIAL CASE under Rules of Court, 1875, Order XXXIV.

The Plaintiffs were the trustees of the *Auckland Union Per-*

(1) 3 D. F. & J. 595. (2) Law Rep. 4 Eq. 537.

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manent Benefit Building Society, now incorporated under the *Building Societies Act*, 1874.

By an indenture of the 12th day of May, 1871, *Thomas Vaughan*, who was the owner of 150 shares in the society, and as such entitled to receive out of its funds in respect thereof the sum of £15,000, on the execution of the security, in consideration of such sum paid by the trustees to him, conveyed unto the trustees, their heirs and assigns, divers freehold parcels of land and other property situate at *Middlesborough*, to hold the same to their use, but subject to a proviso for redemption. *Vaughan* covenanted with the trustees that he, his heirs or sequels in right, would surrender certain copyholds to their use to secure the repayment of the same sum of money.

The indenture contained a proviso that if *Vaughan*, his heirs, executors, administrators, or assigns, should pay to the trustees the sum of £157 10*s.* on the first Tuesday in every calendar month during the term of twelve years next ensuing the date thereof, or such other sums as might be agreed upon between the parties according to the rules of the society, and also pay all subscriptions, fines, expenses, and other payments which might become due from him in respect of the shares or of the advance, then at any time after such several payments should have been made the security should cease and determine, and the trustees would, at the request, costs, and charges of *Vaughan*, his heirs or assigns, indorse on the indenture a receipt for such payment in manner required by the rules of the society.

By an indenture of the 21st day of November, 1874, *Thomas Vaughan* and *George Neesham*, who were carrying on business together in partnership as iron masters under the style of *Thomas Vaughan & Co.*, and who had had assured to them, their heirs and assigns, five acres of land upon which they had erected forty-seven messuages and other buildings upon trust and to the intent that the same might be held and enjoyed as part of their joint stock as partners in trade, but subject to a small yearly rent reserved by the *Inclosure Act* of the 13 Geo. 3; and who were the owners of fifty-five shares of £100 each in the same society, and as such entitled to receive out of its funds in respect thereof the sum of £5500 on the due execution of the security,

in consideration of such sum paid by the trustees to them, granted unto the trustees, their heirs and assigns, the said five acres of land and messuages and buildings, to hold the same to their use, but subject to a proviso for redemption. And the indenture contained a proviso that if *Vaughan* and *Neesham* or either of them, they or either of their heirs, executors, administrators, or assigns, should pay unto the trustees the sum of £50 17*s.* 6*d.* on the first Tuesday in every calendar month during the term of fourteen years next ensuing the date thereof, the first of such monthly instalments to be made on the 1st of December following, or such other sums as might be agreed upon between the parties, and also should pay all subscriptions, fines, expenses, and other payments which might at any time become due from them or either of them, their or either of their executors, administrators, or assigns, according to the rules of the society in respect of the shares or of the premises thereby mortgaged, or of the advance, then at any time after such several payments should have been made the security should cease and determine, and the trustees would, at the request, costs and charges of *Vaughan* and *Neesham*, or either of them, their or either of their executors, administrators, or assigns, indorse on the indenture a receipt for such payments in manner required by the rules of the society.

By an indenture of mortgage dated the 9th day of July, 1875, *Vaughan* and *Neesham*, called "the debtors," of the first part, and *Vaughan*, called "the surety," of the second part, and the *National Provincial Bank of England* of the third part, the hereditaments therein described, and which comprised amongst others, part of the premises comprised in the deed of 1871, were assigned by the surety to the bank, their successors and assigns, by way of mortgage for securing the payment of all moneys then due or thereafter to become due to the bank by the firm of *Vaughan & Co.*, or by *Vaughan* or *Neesham*, who were the partners therein, subject to the mortgage of 1871, so far as it affected the hereditaments comprised in this deed.

Notice of the deed of 1875 was, on the 4th of August following, given by the solicitors of the bank to the trustees and the secretary of the society.

In September, 1876, *Vaughan* and *Neesham*, as partners, and

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each of them separately, went into liquidation, and trustees were appointed, and the proceedings under the several liquidations were pending.

Default had been made in payment of the instalments of money secured by the deed of November, 1874, and considerable arrears were due to the society. The copyholds covenanted by the deed of 1871 to be surrendered had been sold and discharged from the mortgage.

Upon *Vaughan* going into liquidation the bank entered into possession and receipt of the rents of the property comprised in their mortgage, and they had since duly paid to the society all the monthly instalments and other payments which became due from *Vaughan* in pursuance of the deed of 1871, in respect of the shares, or of the advance to him. The monthly instalments and payments had not at any time been in arrear.

By the rules of the society a member desirous of having his property discharged from the mortgage under which it might be liable to the society before the expiration of the full term would be allowed to do so on giving notice to the secretary, and on payment of all moneys that might be due the trustees would cause to be indorsed on the mortgage deed a receipt for the full payment of the amount secured thereby.

On the 11th of February, 1878, the bank manager wrote to the secretary of the society asking to be informed the amount due upon the mortgage of May, 1871, in reduction of which the bank made a payment monthly: and the reply, dated the 13th of February, 1878, was that "if this mortgage were redeemed this month the amount to be paid would be £6449 1*s.* 5*d.*" On the 13th of July, 1878, the solicitors of the bank sent a notice to the secretary of the society that they desired, in pursuance of the rules, to redeem on the 1st of October, 1878, this mortgage, but the society refused to allow the bank to do so, unless they also redeemed the mortgage of November, 1874.

The trustees of the society issued the writ in this action in November, 1878, against the trustees in bankruptcy of *Vaughan* and *Neesham* and the bank, claiming a declaration that they were entitled to consolidate the mortgage of 1874 with the mortgage of 1871, and that the Defendants were not entitled to redeem the

hereditaments subject to the mortgage of May, 1871, until payment had been made to the Plaintiffs, not only of all moneys due to them under that mortgage, but also of all moneys due to them under the mortgage of 1874, together with the costs of the action; for an account of what was due to the Plaintiffs under the mortgage of 1874; and that the Defendants, or some or one of them, might be decreed to pay the amount, with costs; and that in default of payment the several Defendants might be foreclosed of the equity of redemption in the hereditaments comprised in the mortgage of 1874 and in the mortgage of 1871.

After the action was set down for hearing, the society was incorporated under the *Building Society's Act*, 1874, and the action was ordered to be continued by the incorporated society.

The questions for the opinion of the Court were whether the Plaintiffs were entitled to any and what relief, and, in case the Court should be of opinion that the Plaintiffs were entitled, judgment was to be entered for them, and if not entitled, the action was to be dismissed with costs.

The matter came on for hearing before Vice-Chancellor *Hall* on the 1st of December, 1879.

Hastings, Q.C., and *P. V. Smith*, for the Plaintiffs:—

The cases of *Watts* v. *Symes* (1); *Beevor* v. *Luck* (2); *Neve* v. *Pennell* (3); *Baker* v. *Gray* (4); *Selby* v. *Pomfret* (5); *Provident Permanent Building Society* v. *Greenhill* (6) are the most recent authorities bearing on this case, and it is submitted that they shew that the Plaintiffs had, the moment *Vaughan* or his trustee or assignee claimed to redeem the mortgage of 1871, the right to say, "You shall not redeem that mortgage unless, upon taking the accounts, you also redeem the mortgage of 1874." No difficulty has arisen in respect of there having been no default. The society were entitled to consolidate their securities, or, in other words, when there was a claim to redeem their first mortgage, to say to the bank, "You shall not do so without paying us what is due upon both our securities." It will probably be contended that the

(1) 1 D. M. & G. 240.
(2) Law Rep. 4 Eq. 537, 543, 546.
(3) 2 H. & M. 170.
(4) 1 Ch. D. 491, 495.
(5) 3 D. F. & J. 595.
(6) 9 Ch. D. 122.

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society contracted to reconvey to *Vaughan* on payment by him of a certain sum; that he, or those claiming under him, are ready to pay it and desire to redeem; but the answer to that will be, *Vaughan*, with another mortgagor, has, since the first mortgage, mortgaged to the society other hereditaments, and they are entitled to take all the remedies they can by foreclosure or otherwise against all the property to secure themselves against any deficiency. The mere fact that the mortgagees have contracted to reconvey the property has not interfered with their right to consolidate. That right is, upon the authorities, established. It has been well expressed by Vice-Chancellor *Wood* in *Beevor* v. *Luck* (1), and it may be asserted either in an action for foreclosure, or where the mortgagor comes to redeem. The Plaintiffs ask for judgment as in *Beevor* v. *Luck*.

Joshua Williams, Q.C., and *A. T. Watson*, for the Defendants:—

The distinction between legal contract and equitable right has been totally ignored. The other side wish to extend the doctrine of consolidation. As to the cases which have been referred to, it is not clear that there was anything but default in respect of both securities mentioned in them, and until default there can be no foreclosure, no redemption, no tacking, and no consolidation. That is shewn in the cases of *Bonham* v. *Newcomb* (2), *Brown* v. *Cole* (3), *Burrowes* v. *Molloy* (4), and *Ramsbottom* v. *Wallis*, cited in *Coote* on Mortgages (5).

There has been by the society an express legal contract that on payment of a certain sum of money the mortgagor may redeem, and the bank claiming under him wish to avail themselves of their legal right. There has been no default made in regard to the mortgage of 1871. In *Beevor* v. *Luck* the doctrine of consolidation was held to apply. Vice-Chancellor *Wood*, however (6), said that the ground of the doctrine was forfeiture by the mortgagor of his estate, but neither that case, nor the others which have been cited, apply to the present. If a mortgagor pay his money upon the day named for payment there is no equity to

(1) Law Rep. 4 Eq. 537, 543, 546.
(2) 1 Vern. 232; 2 Vent. 364.
(3) 14 Sim. 427.
(4) 2 J. & Lat. 521.
(5) 3rd Ed. p. 599.
(6) Law Rep. 4 Eq. 544.

consolidate. The legal right of the bank has not been forfeited. The society are bound by that legal right, and are not entitled to foreclose both mortgages. The letters which passed between the parties are important, as they shew that the society in February, 1878, admitted that the bank on payment of the sum named could redeem any time that month. The society ought to be required to specifically perform their legal contract.

[*Jones* v. *Smith* (1) was also referred to.]

Hastings, in reply.

HALL, V.C.:—

This case is in some respects new. It has been said that if I hold that the Plaintiffs are entitled to the relief which they ask in this action, I shall be carrying the doctrine of consolidation further than has hitherto been done. If I thought so, I should not be disposed to hold that the Plaintiffs are entitled to my judgment. It seems to me, however, that I cannot refuse to give the Plaintiffs judgment, without departing from the grounds which have been enunciated, and on which judgment has been given in the cases of consolidation to which my attention has been called. The case which to my mind seems to govern this one more than any other is that of *Selby* v. *Pomfret* (2), where Vice-Chancellor *Wood* in his judgment stated the rule thus: "The Defendants have a right to say the mortgagor pledges two estates, although to different persons, and for differents debts, and the law is that when those debts become united in the same creditor, both estates became pledged for the whole amount." I am not at liberty to disregard that statement of the law.

In the present case there is this circumstance which is not unfavourable to the Plaintiffs, viz., that the two mortgages were made originally to the same mortgagees—the trustees of the building society. In *Selby* v. *Pomfret* the judgment goes further, because consolidation was held to apply though the mortgages were not originally made to the same mortgagees, but became united in a different person—a transferee. Where the mortgages are to the same person originally, it is easier to consider that the

(1) 2 Ves. 372. (2) 1 J. & H. 339.

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two securities must have been intended to be made, so that the person upon taking the second security upon other property should be entitled to say, "You (the mortgagor) have given to me personally two securities, you ought not to take one of them away from me." It seems to me to follow, if the true principle is, as stated by Vice-Chancellor *Wood*, that neither property can be taken away by persons claiming under the mortgagor without payment of both debts. That applies of course to *Vaughan*, who is interested in both the properties, and also applies to all the Defendants who claim under him. It seems to me to follow that the Plaintiffs are entitled to judgment.

Reliance has been placed upon what is said to be a special circumstance excluding consolidation. The bank, who claim as second mortgagees of a portion of the property comprised in that mortgage, have gone on making the monthly payments which became payable under it. It seems to me that the fact of there having been payments made in conformity with the proviso in the one mortgage does not operate to take away or prevent there being a charge for the purposes of consolidation, although the charge be of sums not immediately payable. It may well be a charge for the purpose of consolidation, although there may not be a right to enforce payment of the sums so charged.

The fact of these being mortgages to a building society, where the sums secured are payable in a particular mode, and for different advances, seems to me not to vary the case. In every case of a mortgage there is a contract to pay at some time, either expressed or implied, and there is a proviso to redeem upon payment at that particular time. So in the case of these building society mortgages, there is a contract to pay at particular times and in particular ways, and it seems to me that that does not affect the principle upon which consolidation depends, the principle being that the two properties are security for both debts. One of the mortgagors in the second mortgage (*Neesham*) has a right, unquestionably, to say that the property comprised in it should not be made a security for the debt of his partner, and therefore in that respect the case seems to me to present the feature that the Plaintiffs' rights must be qualified, so that he (*Neesham*) may redeem upon payment, without reference to the right of consolida-

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tion, he being no debtor and his estate not being pledged for the sum which was secured by the first mortgage deed. That seems to have been done in one of the cases which have been referred to. Therefore care must be taken in the judgment that *Neesham* and the trustee in his liquidation shall not be damnified in that respect. Whether that will make any real difference in working out the judgment I hardly know, but the trustee of the joint estate, which is pledged by the second deed, is bound of course to the extent to which *Neesham* has mortgaged his estate—that is, for the sum secured by the second mortgage—but not more than that. This must be borne in mind in framing the judgment which will be entered up for the Plaintiffs in accordance with the first part of the claim; and as to the second part, there will be successive rights of redemption allowed, first to the bank, and then to the trustees of the joint estates of *Vaughan* and *Neesham*.

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From this decision the Defendants appealed. The appeal came on to be heard on the 7th of June, 1880.

Joshua Williams, Q.C., and *A. T. Watson*, for the Appellants.

Hastings, Q.C., and *P. V. Smith*, for the Respondents.

In addition to the cases cited at the hearing before the Vice-Chancellor the following authorities were referred to: *Ireson* v. *Denn* (1); *Mills* v. *Jennings* (2); *Matterson* v. *Elderfield* (3); *Kaye* v. *Soley* (4); *Pemberton* on Judgments (5).

JAMES, L.J.:—

We need not trouble you any further, Mr. *Williams*. In my opinion the order of the Vice-Chancellor in this case cannot be sustained. I cannot agree with him that this is not a very considerable extension of the doctrine of consolidation beyond what has ever been done in this Court. It is the first time the doctrine has ever been applied to a case where, in one of the mortgages sought to be consolidated, there has been no default whatever. It appears

(1) 2 Cox, 425.
(2) 13 Ch. D. 639.
(3) Law Rep. 4 Ch. 207.
(4) 2 W. Bl. 726.
(5) 2nd Ed. p. 514.

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to me that that of itself concludes the question. The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the power of the Court of Equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor. At law, independently of a legal estate, when the power of redemption given by original contract is gone, then a person comes into equity to have assistance from the Courts of Equity and asks to redeem upon what are called equitable considerations, and then the Court of Equity says: "This is the price upon which we give you the relief you seek, namely, on your paying all that is due." Then the converse of that, where a mortgagee comes with a bill of foreclosure, is no extension of that; because a bill of foreclosure (it is an action now) never gave and never was intended to give the mortgagee any active remedy. A bill of foreclosure in substance was this: "You have a right to redeem, and you may exercise that right at any time within twenty years, according to the usual practice of the Court, but I do not want to be kept in a state of uncertainty as to whether I am or am not to be redeemed, and therefore, if you want to redeem me, redeem me now;" and the mortgagee has a right to say, "Redeem me upon those terms upon which you would be entitled to redeem if you filed your redemption suit." That is all. If you do not redeem, your equity of redemption is gone; the only result therefore of a bill for foreclosure is to deprive a man of his opportunity of filing a bill of redemption at some future time. If a man does not want to redeem property *A.* in respect of which he has made default, he may be barred as to that. But if he does not require to redeem property *B.*, in respect of which he has made no default, he has no occasion to come into the Court of Equity. The Court of Equity has nothing to foreclose him of, and has no right to deprive him of his legal right to redeem at the proper time. In this particular case the mortgagor says, "You may foreclose the 1874 mortgage as much as you like. I do not care for foreclosure. I do not care what terms you impose upon me with regard to the foreclosure of that mortgage. But with regard to the 1871 mortgage, I have made no default. I do not want to come into the Court of Equity. I have not the remotest

necessity for coming into the Court of Equity. I have as much legal right in the property as if I had a lease or a license to work minerals or any other legal right." And it appears to me that because he owes money upon the 1874 mortgage the Court cannot say, "You owe that money, and you owe it upon insufficient security, therefore I will take some other property from you"—because that is what it comes to—"which is the subject of some other contract." The Court of Chancery had, and this Court has, no more right, because there was an insufficient security given for the one debt, to take the sufficient security, as to which there has been no default at all or no occasion to apply to the Court of Equity, than a man has the right to go and take another man's stock-in-trade, or chattels, or horses, or anything else. If he owes the money he must pay it: and if a creditor takes an insufficient security, he may bring an action to recover judgment, and enforce that judgment in any way in which the law allows it upon any other property. But it seems to me that where a man has a legal right in property *A.*, and an equity of redemption in property *B.* which is an insufficient security, and has no occasion, and never will have any occasion, to come to a Court of Equity with respect to property *A.*, the fact of the two properties being subject to two mortgages gives the Court no more power to take from him property *A.*, than it has to take any other property belonging to him, for the purpose of satisfying the debt for which there is insufficient security. To suppose that that is what was laid down by Vice-Chancellor *Wood* in *Selby* v. *Pomfret* (1), seems to me really to deal unfairly, if I may say so, with the language of the Judge. The language of a Judge is always to be construed with reference to the facts of the case before him. In that case the learned Judge was dealing with a case in which two estates had been reduced to the position of equities of redemption, and as the two estates had been reduced to the position of equities of redemption, the Court was right in saying they must be consolidated. When a property is reduced to an equity of redemption, all the rights arising from that position follow; and the ground of the decision in *Selby* v. *Pomfret* was that the two properties at the time when the right of consolidation was supposed to have arisen had been reduced to the position of mere

(1) 1 J. & H. 339.

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equities of redemption, having only an existence in the Court of Chancery. I am of opinion that there is no authority and no principle for applying that case to a case where there is a property in respect to which no default has been made: the Court would not be administering law, but would be simply usurping the power to take away a man's property against his will without any legal right to do it. That, according to my view, is sufficient to determine this case.

With regard to *Beevor* v. *Luck* (1), where it was decided that you could consolidate a security given by a partner for his own private debt with a security given by two or more partners for a partnership debt, I am bound to say I am unable to see myself upon what principle that could be done. It is admitted here, for instance, that *Vaughan's* partner *Neesham* could not be made a party properly in respect of the redemption of the 1871 mortgage, and I cannot conceive any mode in which any action could be instituted bringing those two properties into one action for the purpose of redemption, whether it was by the mortgagee or whether it was by *Vaughan*, which *Neesham* could not have demurred to as being a person improperly brought in to deal with an estate with which he had nothing whatever to do, either as to the property or as to the debt. The language of the order under appeal saying his right is to be reserved seems to me to shew how utterly impossible it is to work out anything which makes a security of two or more persons a security of one person only for his own debt. That is a point as to which I think it necessary to express the opinion I have stated which I entertain very strongly; but I rely upon the first ground, that you cannot bring in by the doctrine of consolidation any security as to which there is nothing existing but the legal right of reconveyance upon certain terms and conditions, and as to which there is no equity of redemption requiring the assistance of a Court of Equity to enforce.

COTTON, L.J.:—

I am also of opinion that the decision of the Vice-Chancellor cannot be supported.

There is no decided case which supports it, and in my opinion it

(1) Law Rep. 4 Eq. 537.

is not a proper consequence from those principles which have been laid down in the authorities with reference to the right of consolidation. In order to deal with the case it is necessary to consider what that principle is.

I will deal first with the point which was very much relied upon by the Respondents, namely, that consolidation is in fact an implied pledging of both estates for both the debts when the mortgage on the second estate is made. Reliance in support of that proposition was placed on an expression of Vice-Chancellor *Wood* in the case of *Selby* v. *Pomfret* (1), where he said this: "The Defendants have a right to say 'the mortgagor pledges two estates although to different persons and for different debts, and the law is that when those debts become united in the same creditor both estates became pledged for the whole amount.'" Now, if there had been inserted there "become as if pledged for the whole amount," with reference to the case he had to decide, the expression would have been quite accurate, because it was a suit for redemption, and although one of the estates had been sold and there had been a surplus of the purchase-money, yet it was a suit for redemption, and the question really was whether the mortgagor or his representatives could come into Court insisting on his equitable right to redeem without that right being interfered with by the principle of consolidation. It would be wrong to attribute to that expression of the Vice-Chancellor a decision that the doctrine of consolidation is the consequence of a pledge of both estates as by contract for both the debts. The words must be taken as referring to the case before him, and simply as saying that, as against the Plaintiff coming to redeem, the Defendant has a right to say he cannot take one without paying off the debt on the other, and treating them as if they were both pledged—not laying down that they were in fact pledged, or that the consequence must be in all respects the same as if they were pledged, but only in the particular case the consequence would be the same as if they were pledged for both debts. But the principle really is this, as already mentioned by the Lord Justice *James*, that originally it was only, as against the mortgagor, an interference by the Court of Equity with his right of redemption.

(1) 1 J. & H. 339.

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The right to redeem was the creature of equity, and the Court of Equity held that it was inequitable that the mortgagor should take from his creditor the sufficient estate and leave him with an insufficient estate as a security for a different debt, and in granting its own special relief it refused to do so except upon the terms of his doing what the Court of Equity thought equitable. That was extended to persons taking from him, on the simple ground that the purchaser of an equity took with all the equities affecting his vendor existing at the time the purchase took place. That being so, no doubt it has been extended not only to a suit for redemption but to a suit for foreclosure, on the ground already enunciated by Lord Justice *James*, that such a suit is simply calling upon the mortgagor, or the owner of the equity of redemption, to exercise his equitable right then or never. But in order to enable the mortgagee to bring an action and to consolidate there must be two debts due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem or claim them back, and that cannot apply to a case where, as regards one of the securities, there has been no forfeiture at all, where the debt is not due, and where as regards that estate and that security—an independent security—steps could not be taken as against the owner of the equity of redemption to bring him into Court and to call upon him to redeem or to be foreclosed. It cannot apply to a case where the stipulation is that certain monthly payments are to be made, and there has been no default, and the contract goes on to say that if those payments are all made, then the estate shall revest, there having been no forfeiture so as to make the right of the owner of the estate subject to the security an equitable one only, not depending upon legal contract.

This really disposes of the present case as regards the bank. The bank owns a property, or is mortgagee of a property subject to a security to provide for the payment of certain monthly sums, and there has been no default made in any of those payments. When those payments are completed the estate will, by the original legal contract between the parties, revest in the person who conveyed it to the society, or to those who claim through him—the bank, who will stand exactly in his place. That seems to me to be already dealt with upon this ground, independently of what

I have already laid down, that as against the bank there is no right whatever to bring them into Court at all. There has been no default. There is no right, therefore, on behalf of this society, the first mortgagee, if there were no other mortgage in question, to bring the bank before the Court at all—no right to call upon them to redeem, and no right therefore to bring them here to have this consolidation enforced against them. That again would dispose of the matter, because, of course, the right of consolidation as against a particular individual can only arise where, independently of the consolidation, there is some right to bring him before the Court. That is not so here. As against the bank there can be no consolidation.

But I would deal with the matter as if was put by Mr. *Smith* in his argument. He said, "Assuming that all these instalments had been paid, and we had come to the end of the term during which, under the original deed, those payments were to be made, then I should say I should have a right to come into Court and say to the bank, or to any one else claiming through it, 'Still this remains as a security for that other debt in respect of which there has been default.'" Now, in my opinion that is wrong, because there the right of the bank would depend, not on an equitable right independently of legal contract, but on the very terms of the deed, which stipulated that if at the end of the time all these monthly payments had been duly discharged, then the society would indorse upon the mortgage a discharge; which under the Act of Parliament, would have the effect of putting an end to it, and vest the estate in the hands of the person who conveyed it to the society.

There is only one other point which has to be dealt with, and that is this, that there has been a notice given by the bank insisting upon the right to redeem, which notice has been given according to the rules of the society. This is called inaccurately a right to redeem. It is simply a right to anticipate the payments stipulated to be made over a long period of years, and once for all to pay down the amount as calculated in the Tables. When that is paid there is no redemption in the sense of a person who has at law lost his right to the property coming into a Court of Equity and asking equitable assistance to relieve him from the legal

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forfeiture. He is in the same position as if at the end of the term he had duly paid all the stipulated sums, and was asking that the contract might be performed, and that the discharge might be indorsed on the mortgage. In fact the rule in question is introduced by this, "If any member shall be desirous of having his property discharged from the mortgage under which it may be liable to the society before the expiration of the full term," and when you come to look at the stipulation it is merely what I have stated—an anticipation or payment down in a lump sum of that which by the security was to be spread over a term of years. So that, even if the bank were coming to insist on the notice, although it is not necessary to decide the question, in my opinion this right of consolidation could not be insisted upon as against them. There is one other point which I ought to mention with reference to the right of consolidation. It has been applied where property has been sold, and the money arising from the sale of one mortgaged property has left a surplus, and there is another insufficient estate not sold. That was the case of *Selby* v. *Pomfret* (1). A mortgagor coming to redeem was not allowed to take away the surplus without redeeming the other. That may possibly be considered as in some respects inconsistent with what I have said before. That is established, but whether it is proper or desirable to extend it, is another question. But in such a case the Court is still administering its own peculiar jurisdiction in assisting the party to get the surplus of the purchase-money. It is enforcing a trust, and not enforcing or aiding a contract enforceable at law, under which there is a right to have the surplus paid back again to the party claiming it; and, therefore, it really comes within the same principle, and may be considered as consistent with the principle upon which the rule was originally established, and as a more legitimate extension of that rule where a Court of Equity is giving its own peculiar remedy and its special assistance. Where a party obtaining relief has not a legal right to any assistance it imposes this fetter or condition upon him, that he shall not have that assistance without doing that which the Court of Equity, independently of contract, considers it is equitable to enforce against him.

(1) 3 D. F. & J. 595. 7 Jur. N.S. 836

THESIGER, L.J.:—

I have very little to add to what has fallen from the other members of the Court beyond expressing my concurrence in their views.

The doctrine of the consolidation of mortgages forms part of the established law of the land, and, however undesirable we or any of us may think that doctrine to have been in its origin, we are bound to give effect to it so far as we can see that the principles relating to it apply to the particular case before us.

Now, in the course of the argument before us there has been pointed out by more than one member of the Court the injustice to which the principles which are contended for by the Respondents in this case would lead, if adopted by the Court, but at the same time, when it is pointed out that the whole doctrine has—and I cannot doubt that it has—led in many cases to injustice, the mere fact that there is injustice or hardship in the particular case, although some argument, is not a very strong argument against applying the principles contended for. But it appears to me for the reasons which have already been given that here we have an attempt to extend the principle far beyond anything that can be collected from the decided cases, or from the principles laid down in those cases. The very foundation of this doctrine is that a person who is compelled to seek the assistance of equity shall himself do equity. That has been applied as regards a person who has an equity of redemption and seeks to enforce that equity of redemption, by imposing upon him a correlative obligation. It has also been applied in favour of a person seeking the assistance of the Court of Equity by an action for foreclosure by giving him a correlative right. But both as regards the obligation and as regards the right the Court has to see that the case is one in which it has to deal with equitable obligations and equitable rights. Now here we have neither to deal with the one nor the other. The right of the bank here is a right which exists at law and, for myself, I utterly fail to see what defence at law before the *Judicature Act*, and I may say since the *Judicature Act* also, there would have been, or would now be, to an action founded upon an arrangement between a mortgagor and mortgagee, by which arrangement the mortgagor has a right to have his property

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discharged from any mortgage upon it upon payment of certain sums which are to be ascertained according to the rules. That being so, unless some decision can be pointed to which shews that Courts of Equity have gone beyond the principles which I have suggested, namely, the principles which shew that the obligations and rights are founded simply upon equitable obligations and rights, and relate to them and to them only, certainly, for myself, I would not carry the principles which have been laid down with regard to the doctrine of consolidation of mortgages beyond what has been distinctly and expressly laid down.

I need not add anything more to the reasons given beyond this, that there is a subsidiary point in this case upon which Lord Justice *James* has expressed his opinion. I do not, as at present advised, in any way dissent from that opinion, but as it is unnecessary to express an opinion upon it in this case, I would prefer to reserve my judgment upon it.

Solicitors for the Bank: *Wilde, Berger, Moore, & Wilde.*

Solicitors for the Society: *J. Crowdy & Son*, agents for *Trotter, Bruce, & Trotter, Bishop Auckland.*

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Adjudication of Bankruptcy—Jurisdiction—Prior Adjudication by Irish Court—Discretion of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 8.

A bankruptcy petition having been presented in an English County Court against a trader, who carried on business in *England* and *Ireland*, and had creditors and assets in both countries, he obtained an adjudication against himself on his own petition in the Irish Bankruptcy Court before the English petition could be heard. It was alleged that if an adjudication was made on the English petition the title of the trustee would relate back so as to avoid certain transactions of the bankrupt which could not be avoided under the Irish adjudication. No one but the debtor opposed the English petition:—

Held, that an adjudication ought to be made on the English petition for what it was worth, leaving for future determination the question in which Court the assets ought ultimately to be administered.

PETER McCULLOCH carried on the business of a general merchant at *Monaghan*, in *Ireland*, and the business of a corn and

provision merchant at *Liverpool*. On the 19th of April, 1880, he presented a petition to the Court of Bankruptcy in *Ireland* (under the *Irish Bankruptcy Act* of 1872), praying that his person and property might be protected from process until further order, and that such proposal as he might be able to make to his creditors for the future payment or compromise of his debts or engagements, and which should be agreed to by them, might be executed under the direction of the Court.

On the same day a protection order was made, protecting the person and property of *McCulloch* from process until the 18th of May, 1880. A meeting of the creditors under this petition was summoned for the 3rd of May. The meeting was held on the 3rd of May, and a proposal was made by the debtor, but was rejected. No further proceeding was taken under the petition.

On the 24th of April, 1880, *Joseph Pyke & Son* served on *McCulloch* a debtor's summons, issued out of the *Liverpool* County Court, for £327 10*s*. He failed for seven days to comply with the summons, and on the 3rd of May *Pyke & Son* presented a bankruptcy petition against him in the County Court, alleging as an act of bankruptcy the failure to comply with the summons. The same day a receiver of the debtor's property was appointed. The 13th of May was fixed for the hearing of the petition.

On the 4th of May, 1880, at 3·50 P.M., *McCulloch* presented a petition to the Irish Bankruptcy Court, in which he alleged that he was unable to meet his engagements with his creditors, and that he verily believed that he could make it appear to the satisfaction of the Court that his available estate was sufficient to produce the sum of £50 at the least. And he prayed that he might be adjudicated a bankrupt. On this petition an order was the same day made adjudging him a bankrupt.

The receiver appointed by the County Court sent a man to *Ireland* to take possession of the debtor's property there. He took possession on the 4th of May, but was the same night turned out of possession by a receiver appointed by the Irish Court.

On the 5th of May an order was made by the County Court (under sect. 74 of the *Bankruptcy Act*, 1869), that aid be sought from the Court of Bankruptcy in *Ireland* for the purpose of carrying out the order of the County Court of the 3rd of May

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appointing a receiver. And the Court did thereby request the Irish Court to be ancillary to itself and to render such aid generally as might be necessary to give effect to the order of the 3rd of May appointing the receiver. On the 7th of May the Irish Court refused this request, on the ground that no adjudication had been made by the English Court. On the 13th of May *Pyke & Son's* bankruptcy petition was heard in the County Court, and was dismissed, on the ground that the debtor had been already adjudicated a bankrupt in *Ireland*, and that his assets were vested in the Irish assignee.

Pyke & Son appealed to the Chief Judge. The appeal was heard on the 31st of May, 1880.

There was evidence that the debtor had creditors in *England*, *Ireland*, and *Scotland*, and that he had assets both in *England* and *Ireland*. The greater part both of the creditors and the assets were in *Ireland*.

Winslow, Q.C., and *D. French*, for the Appellants, cited *Ex parte Claxton* (1); *In re O'Reardon* (2); *Ex parte Walker* (3).

Charles Russell, Q.C., and *Walton*, for the debtor, cited *Ex parte Griffin* (4); *Ex parte Brigstocke* (5); *Ex parte King* (6); *In re French* (7).

BACON, C.J.:—

No doubt in all cases of this kind, difficulties may arise, and it is very easy to magnify them, and to suggest that great expense may be incurred, and that there may be a conflict of jurisdiction. Such considerations are entitled to the greatest possible weight, and I would give them their due weight if I found that the necessity existed. But I do not think there is any reason to fear a conflict of jurisdiction in the present case. In my opinion it is an extremely simple one. A man commits an act of bankruptcy by disobeying a debtor's summons. It is unimportant that he was then trying to make other arrangements in *Ireland*, and

(1) Law Rep. 7 Ch. 532.
(2) Ibid. 9 Ch. 74.
(3) 6 D. M. & G. 752.
(4) 12 Ch. D. 480.
(5) 4 Ch. D. 348.
(6) 3 Ch. D. 461.
(7) I. R. 1 Eq. 66.

that his proposals were not accepted. He is a trader in *Liverpool*, and in *Liverpool* he is served with a debtor's summons which he has not obeyed. The right of the summoning creditors, therefore, to proceed in bankruptcy is clear. It is quite right to bear in mind that, if the Court, administering the law in bankruptcy, finds that an inequitable use is being made of the materials upon which bankruptcy proceedings could be founded, it would disregard the legal requisites of an adjudication, for the Court of Bankruptcy has at all times (and I wish it was always recollected) been a Court of Equity as well as a Court of Law. In the present case there is no suggestion that any inequitable use can be made of the proceedings taken in *England*. They are the most ordinary commonplace proceedings. In the interval between the presentation of the petition and the hearing, the debtor had made himself a bankrupt in *Ireland*, and upon proof of that adjudication the learned Judge of the County Court declined to adjudicate him a bankrupt here. The simple question now is whether that was right or wrong. I think that *ex debito justitiæ* the petitioning creditors in *England* are entitled to an adjudication, there not being in existence any of those equitable considerations which have induced the Court in other cases to say that, although the legal requisites to an adjudication were in all respects perfect, it was not equitable that the bankruptcy should proceed. The reason why the English creditors desire to have an adjudication in *England* is that they may have the benefit of the law which enables them by relation back of the trustee's title to impeach any transactions of the bankrupt which can be impeached. Then why should he not be adjudicated? The reason suggested is that his property is in *Ireland*, that most of his debts are in *Ireland* (facts which were not before the learned Judge below, and therefore formed no ingredient in his judgment), and that the authority of the law in *England* does not extend so as to overrule or counteract anything done in *Ireland*. It is quite true that it does not, but what reason have I to suppose that, if a representation were made to the Court in *Ireland*, shewing that by reason of the doctrine of relation back the creditors would be greatly benefited by an adjudication in *England*, the Court in *Ireland* would not readily adopt it? I have no fear whatever of any conflict of

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jurisdiction. The Irish Court will do what the law requires that it should do, without regard to the fact that there are different laws in that country and in this. I do not at all say that the bankrupt has done a fraudulent thing by making himself bankrupt in *Ireland*. He had a right to do so. There is more or less of suspicion attaching to it, but with that the Court in *Ireland* will deal. If an English adjudication takes place, the English trustee will have to go to the Irish Court, not suggesting that the English Court has any supreme power or authority over the Irish Court, but to ask that the Irish Court will, with the assistance and concurrence of the English trustee, do what is required in the administration of the bankrupt's estate. That is all the Appellants asked for. The petitioning creditors being entitled *ex debito justitiæ* to an adjudication, the learned Judge ought to have made it. What the consequences of it may be will have to be decided hereafter. No rights are involved in it, except such legal rights as flow from the fact of the debtor being adjudicated a bankrupt in *England*. Upon the materials before the learned judge, I think that the petitioning creditors were entitled to have the adjudication they asked for.

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From this decision the debtor appealed. The appeal was heard on the 17th of June, 1880.

Charles Russell, Q.C., and *Walton*, for the debtor:—

There may be jurisdiction to make the adjudication, but the case is one in which the Court in the exercise of its discretion ought to have refused to make it. The property of the debtor was already vested in the Irish assignee. A petitioning creditor has not, as the Chief Judge thought, an absolute right to an adjudication on proving the statutory requisites. The right to an adjudication is not a personal one, but a right for the benefit of all the creditors. It is contrary to the practice to make a second adjudication when there is a subsisting valid adjudication, unless the Court has power to deal with the first adjudication, or unless it is necessary to make a second adjudication for the benefit of the creditors, *e.g.*, if the second adjudication would relate back to an earlier act of bankruptcy, and thus override other transactions

with the debtor. It lies on those who allege this necessity to prove it. At Common Law it was formerly held that while a valid adjudication was subsisting a second adjudication was a nullity: *Till* v. *Wilson* (1); *Fowler* v. *Coster* (2); *Phillips* v. *Hopwood* (3); though this view has been modified by *Morgan* v. *Knight* (4), but there the assignees under the first bankruptcy did not interfere. In *Ex parte Roberts* (5) a first bankruptcy, which had been obtained on the petition of the bankrupt, was annulled on the application of creditors who wished to obtain an adjudication of their own with the view of overreaching certain transactions of the bankrupt, but the order was made with the consent of the assignees under the first bankruptcy. In *Ex parte Louch* (6) both the bankrupt and the assignees consented to the annulling. That there is no absolute right to an adjudication is shewn by *Ex parte Brigstocke* (7). The evidence shews that the bulk of the debtor's assets are in *Ireland* and the bulk of his creditors, and that the majority of the creditors wish to have the assets administered in *Ireland*. No advantage can result from the second adjudication; and there may be great inconvenience, and possibly a conflict of jurisdiction.

[JAMES, L.J., referred to *Ex parte Fenning* (8).]

If it is desired to have a relation back to an earlier act of bankruptcy the proper course would be to apply to the Irish Court to annul the first adjudication, so that an adjudication might be obtained in *Ireland* on a creditor's petition: *In re French* (9).

[The *Irish Bankruptcy Acts*, 20 & 21 Vict. c. 60, 35 & 36 Vict. c. 58, were also referred to.]

Winslow, Q.C., and *D. French*, for the petitioning creditors:—

No act of bankruptcy has been committed in *Ireland* on which a creditor could petition there. The jurisdiction attaches in the country in which the act of bankruptcy is committed: *Ex*

(1) 7 B. & C. 684.
(2) 10 B. & C. 427.
(3) 1 B. & Ad. 619.
(4) 15 C. B. (N.S.) 669.
(5) 3 D. F. & J. 747.
(6) De G. 463.
(7) 4 Ch. D. 348.
(8) 3 Ch. D. 455.
(9) I. R. 1 Eq. 66.

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parte Crispin (1). An adjudication is *ex debito justitiæ* where the statutory requisites exist, unless there is fraud or malpractice on the part of the petitioning creditor: *Ex parte Claxton* (2). What right had the debtor by his own act to oust the jurisdiction of the Court which had obtained seizin of the matter by the issuing of the debtor's summons? The jurisdiction of the Irish Court is entirely separate and distinct from that of the English Court. If necessary, the two adjudications might go on together: *In re O'Reardon* (3). That a second valid adjudication may be made against an uncertificated bankrupt is shewn by *Morgan* v. *Knight* (4). Under a debtor's own petition the title of the assignee could not formerly relate back beyond a declaration of insolvency by him: *Stevenson* v. *Newnham* (5). And, under the present law, the title of the trustee cannot relate back to a date anterior to the time at which any of the debts of the creditors were contracted: *Marks* v. *Feldman* (6); *Robson's* Bankruptcy (7); *Whitmore* v. *Dowling* (8).

[JAMES, L.J.:—I cannot find in the Irish Acts any provisions as to relation back.]

The creditors will have under the English adjudication greater rights than under the Irish one: *Paull* v. *Best* (9). The petitioning creditor is availing himself of his statutory right, and no one is opposing him but the debtor. If the English adjudication is upheld it is probable that the Irish Court will annul the first adjudication as not being so beneficial to the creditors as the second.

Walton, in reply.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge ought to be affirmed. I think it is our duty under all the circumstances of the case to allow the English adjudication to stand for what it is or

(1) Law Rep. 8 Ch. 374.
(2) Ibid. 7 Ch. 532.
(3) Ibid. 9 Ch. 74.
(4) 15 C. B. (N.S.) 669.
(5) 13 C. B. 285.
(6) Law Rep. 4 Q. B. 481; Ibid. 5 Q. B. 275.
(7) 3rd Ed. p. 503.
(8) 2 F. & F. 134.
(9) 3 B. & S. 537.

may be worth. It is a very material circumstance that the only person who is really contesting it is the debtor. We have nobody before us but the debtor, who says that he ought not to have been made a bankrupt. It is clear that he is within the very words of the *Bankruptcy Act*. He has committed an act of bankruptcy. The creditors on whose summons he had failed to pay the debt, and had thereby committed an act of bankruptcy, were before the proper tribunal asking that their debtor might be adjudged a bankrupt. The fact that he had been previously adjudged a bankrupt did not make that untrue. He was a bankrupt. It is not necessary for us to say that in every case the words of sect. 8, "shall be adjudged bankrupt," make the adjudication so clearly *ex debito justitiæ* that the Court has no discretion in the matter. The Chief Judge has pointed out that notwithstanding those words the Court retains its old jurisdiction to refuse to make a man bankrupt for an improper purpose, and to annul an adjudication when the justice and the convenience of the case require it. It is possible that after this debtor has been adjudged a bankrupt, as is now asked, and when the matter has been further investigated, and the facts ascertained, either in this Court or in *Ireland*, one of the two Courts may come to the conclusion that it is better that the proceedings on one of the petitions should be stayed, and possibly that one of the adjudications should be annulled. But if we were to refuse to allow this adjudication to be made we should prejudge the question which of the two Courts is to have the administration of the assets, without having the proper materials before us to enable us to determine what, in the exercise of a judicial discretion, either here or in *Ireland*, will be the right course. I have no doubt the Irish Court will act rightly and will consider whether, inasmuch as they have a control over the proceedings, it is for the benefit of the creditors that they should retain or not retain the administration of the assets. At present we do not pretend to suggest or even to hint to the Irish Court what they ought to do. But we think they would not have the proper materials before them for determining what is right to be done with the estate unless we allowed the proceedings in *England* to ripen so far as an adjudication in bankruptcy.

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COTTON, L.J.:—

I am of the same opinion. It is not, I think, necessary to give an opinion whether under circumstances like these it is absolutely necessary that we should grant the adjudication. But the words of the section are very strong, and in my opinion in a case like this we ought not to refuse an adjudication. The petition was presented in *England*, and everything existed necessary to enable the persons who presented it to obtain an adjudication. It being conceded that there is power to make the adjudication, we are asked not to make it, because a petition was subsequently presented in *Ireland* on which, on the application of the debtor, he was adjudged bankrupt. For the reasons which have been given by Lord Justice *James*, I agree that it is desirable that we should grant the adjudication, in order that an application may be made to the Court in *Ireland*, and that it may consider whether it is not more for the benefit of the creditors that the English bankruptcy should go on, the title in which certainly goes back as far as the title in the other bankruptcy, and may, so far as we know, go further back. I am of opinion that as a matter of discretion we ought not to refuse to make the order. There may no doubt be difficulties in working it out, but that is not the present question. The question is whether we should at once render it impossible for an application to be made in *Ireland* for the purpose of letting these proceedings go on.

THESIGER, L.J.:—

I also think it was reasonable that under the present circumstances the English adjudication should be made. It was reasonable as between the petitioning creditors and the debtor, because we find that they had taken all the necessary steps in order to constitute an act of bankruptcy, and the act of bankruptcy was immediately followed by the petition, and, without expressing any opinion whether the debtor was or was not justified in what he did, it is obvious that the proceedings taken in the Irish Court on the 4th of May were taken by him for the express purpose of getting rid of the English bankruptcy. Then, as regards the creditors generally, I think it is reasonable, at all events at present, that the English bankruptcy should stand, as it is obvious that there

may be transactions which may possibly be overreached (to use the expression which has been used in some of the cases) in the English bankruptcy which could not be overreached in the Irish bankruptcy, owing to there being no such relation back under the Irish bankruptcy law as there is under the English. It is true that an application might be made, such as was made in *In re French* (1), to the Irish Court to annul the existing bankruptcy, and to make a new adjudication on the petitioning creditor's debt. But no such application has been yet made, and if it were made it might not result in a fresh adjudication, while in *England* there is an adjudication existing under which everything can be done which is required.

Solicitor for Appellant: *J. Hands,* agent for *P. S. Levy, Liverpool.*

Solicitors for Respondents: *Singleton & Tattershall,* agents for *Yates, Son, & Stananought, Liverpool.*

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Mortgage — Attornment Clause — Excessive Rent — Distress—Bankruptcy of Mortgagor—Fraud on Bankruptcy Law—Leave to appeal to House of Lords—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 34, 71.

Though an attornment clause in a mortgage deed is a valid clause, if it constitutes a real relation of landlord and tenant between the mortgagee and the mortgagor, and a distress levied for the rent fixed by the clause will be good as against the trustee in the bankruptcy of the mortgagor, and will thus enable the mortgagee to obtain a security upon chattels of the mortgagor the proceeds of which would otherwise have been distributed among his creditors, yet, if the rent fixed by the clause be so excessive that the Court comes to the conclusion that it was not intended to create a real rent or a real tenancy, but that the clause was a mere device to enable the mortgagee, in the event of the bankruptcy of the mortgagor, to obtain an additional security upon chattels which would otherwise have been distributed among his creditors, the clause and any distress levied under it, even though before the commencement of the bankruptcy, will be invalid as against the trustee in

(1) I. R. 1 Eq. 66.

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the bankruptcy of the mortgagor, as being a fraud upon the bankruptcy law.

Morton v. *Woods* (1) explained.

Ex parte Williams (2) and *In re Stockton Iron Furnace Company* (3) discussed.

Decision of *Bacon*, C.J., reversed.

In determining under sect. 71 of the *Bankruptcy Act*, 1869, whether leave should be granted to appeal to the House of Lords, the Court will be guided by the same principles as under sect. 18 of the *Bankruptcy Act*, 1849 (12 & 13 Vict. c. 106).

IN January, 1877, *Joseph Bowes*, a wholesale, retail, and manufacturing chemist at *Whitehaven*, was indebted to his bankers, the *Bank of Whitehaven*, a limited company, in the sum of £7090 7*s.* 3*d.* on the balance of his current account. The bank pressed him for security, and he agreed to give them a mortgage of some real estate belonging to him and of some personal chattels, to secure the payment of the balance then due to the bank, and all sums which should thereafter become due from *Bowes* to them. Accordingly, a mortgage deed was executed on the 27th of February, 1877, and by it *Bowes* granted and assigned to the company by way of mortgage a manufactory and shop, warehouse and premises, at *Whitehaven*, occupied by him for the purposes of his business, and some other real estate in *Whitehaven*, and also "his trade or business of a wholesale, retail, and manufacturing chemist, and all and singular book debts, stock-in-trade, and other effects and fixtures, articles and things now or hereafter during the continuance of this security belonging or to belong to the said business," with power for the company at any time or times thereafter during the continuance of the security to take possession of all or any of the assigned premises, to hold the same unto the company and their assigns subject to the proviso for redemption thereinafter contained.

The deed contained the following clause:—

"The mortgagor doth hereby attorn and become tenant to the said company and their assigns of the hereditaments hereinbefore expressed to be hereby granted and assigned, or such part thereof as is in the possession of the mortgagor, as tenant from year to

(1) Law Rep. 4 Q. B. 293. (2) 7 Ch. D. 138.
(3) 10 Ch. D. 335.

year from the date hereof, at the annual rent of £8000, payable quarterly in advance on the 27th day of February in every year, the first year's rent being now already due and payable, and the said tenancy to be determined by the said company or their assigns at one week's notice, unless the aforesaid rent for the current year be fully paid before the giving of such notice. And the mortgagor doth hereby admit that he has paid to the said company the sum of one shilling on account of the said rent: Provided always that all rent which may be paid or recovered under or by virtue of the attornment hereinbefore contained shall be applicable in or towards payment or satisfaction of the principal moneys and interest intended to be hereby secured, and that any surplus shall be accounted for to the mortgagee."

The deed was stamped to cover £8000. It was never registered as a bill of sale. There was evidence that it was the practice of the company to require an attornment clause similar to the above clause to be inserted in mortgages given to them by their customers, and that they expressly stipulated for its insertion in the present case. There was also evidence that the annual value of that part of the mortgaged property which was in the occupation of the mortgagor was £140, and that it was assessed to the poor-rate at the gross estimated rental of £140.

Bowes remained in possession of that part of the mortgaged premises which he occupied at the date of the deed until the 30th of May, 1879. On that day the company distrained upon his goods and chattels which were on the premises in his occupation for the sum of £6530 11*s.* 1*d.*, as for part of the one year's rent which under the attornment clause had accrued due on the 27th of February, 1878. This sum was the amount which was at the time of the distress due from him to the company. On the 3rd of June, 1879, *Bowes* filed a liquidation petition in the *Whitehaven* County Court, and a receiver was appointed; and on the same day an order was made restraining the company until the 25th of June from taking any further proceedings under their distress. By arrangement the company's bailiff remained in possession of the distrained goods and chattels until the appointment of trustees in the liquidation, and after their appointment it was arranged that the company's bailiff should withdraw from possession, with-

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out prejudice to the rights of the company under the distress, and that the trustees should realize the goods distrained, and should pay the proceeds of sale, to the extent of £6530 11s. 1*d.*, to the company, in case it should be determined that the distress was legal and valid.

The company afterwards applied to the County Court for an order that the trustees should pay over the proceeds of sale to the company to the extent of their debt. The Registrar, acting as Judge, was of opinion that the distress was invalid as against the trustees, and he refused the application.

The bank appealed to the Chief Judge.

The appeal was heard on the 26th of February, 1880.

Horton Smith, Q.C., and *Whitworth*, for the Appellants:—

It is said that the attornment clause was a sham by reason of the excessive amount of rent: *Ex parte Williams* (1). But that decision has been explained by *In re Stockton Iron Furnace Company* (2); and *Morton* v. *Woods* (3) shews that such a distress as this was lawful.

Roxburgh, Q.C., and *T. A. Roberts*, for the trustees:—

The case is within *Ex parte Williams*, and cannot be distinguished from it in principle.

BACON, C.J.:—

I think this case is entirely covered by decision.

In *In re Stockton Iron Furnace Company* there was only one point upon which the Lords Justices differed from the decision which I pronounced. I find, as a guide, that in *Ex parte Williams* the Court were satisfied that the attornment clause, in its provisions and terms, and in the amount of rent reserved, amounted to clear evidence of an intention to evade the bankruptcy law. In considering *In re Stockton Iron Furnace Company* I thought I could safely infer from the facts that it was the intention of the parties to evade the bankruptcy law; and I so decided. But when the Lords Justices came to review the facts of that

(1) 7 Ch. D. 138. (2) 10 Ch. D. 335.
(3) Law Rep. 4 Q. B. 293.

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case, they were of opinion that I had drawn an erroneous conclusion. That is all that was decided in *In re Stockton Iron Furnace Company* (1). In that case the amount of rent was passed over cursorily, and no stress whatever was laid upon it. No such proposition can be drawn, as Mr. *Roxburgh* and Mr. *Roberts* have contended, from that case, as that the test is whether the rent is a fair one or not. I cannot agree in that contention. I do not think that such a thing was decided in either of those cases. The monstrous amount of rent reserved in *Ex parte Williams* (2) struck their Lordships very forcibly, and was one of the elements from which they drew their conclusion. In the other case no stress seems to have been laid on the amount; nor do I find any case involving such a provision as this, in which the question has been raised whether the rent is a fair one or not.

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Let us consider what the circumstances were. The bankers were trusting their debtor with a large sum of money. The only security he had to offer them was the property mentioned in the mortgage deed, which consisted in part of a large chemist's manufactory, and all the things incident to that—machinery, engines, and a variety of other things, and, the bank having been secured by mortgage, it was stipulated in the first instance that they should have an additional security by way of attornment. By the deed that intention is carried into full effect. This was a contract between the parties. The amount of the rent, therefore, seems to be a most indifferent thing. Attornment clauses have been very long in use in mortgage deeds. The first, and perhaps the most important motive which induces mortgagees to take them is this—they avoid the inconvenience which attends their going into possession as mortgagees, whereby the mortgagee becomes liable for all that he might have received but for his wilful neglect or default.

In the case before me I find another and a greater inducement; and perhaps it is that which led to the fixing of the amount of the rent. They desired, when default should happen, to have the means of procuring payment of their mortgage debt, namely, £8000. Although it may be a large amount to pay for the rent of the premises, notwithstanding that it includes the use and

(1) 10 Ch. D. 335. (2) 7 Ch. D. 138.

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enjoyment and occupation of all the machinery which may have been there—yet they desire to have the means of enforcing payment of their mortgage debt. All that they take in respect of rent is to go in discharge of their mortgage debt; and that must be borne in mind, even if I were to pay greater attention than I feel inclined to do to the suggestion that the rent must be a fair rent. That is a fair rent which parties competent to deal with their own interests fix upon as the amount of the rent. The debtor owing £6000 or £7000 agrees, "I will become your tenant if need be, and you shall enforce by means of distress payment of £8000, if that be the amount due." What question can there be about the fairness of that? In my opinion there is no question.

The case of *In re Stockton Iron Furnace Company* (1) is valuable for the observations which it contains, which traverse the whole ground of these attornment provisions, and no disapprobation is expressed by the Judges, either in that case, or even in *Ex parte Williams* (2), of the use of an extensive attornment clause. Attornment clauses are in themselves valid. They can only be impeached, that is to say, the contract between the parties can only be set aside, if you can infer from the facts that there is an attempt to defraud the other creditors of the mortgagor in the event of bankruptcy happening. There is not a particle of evidence in this case which leads me to think that such an intention was present here.

Other points were suggested in the course of the case, but they have not been argued, nor are they capable of being argued. It is said that this deed, which was executed more than twelve months before the liquidation, was an act of bankruptcy. But that is not within the statute, and it cannot be denied that the powers of the attornment clause were exercised before any statutory act of bankruptcy was committed. I have not heard it suggested that there was any earlier act of bankruptcy than that which was committed by the filing of the petition. Relying upon the law as it is distinctly laid down in *In re Stockton Iron Furnace Company*, I am bound to hold that this is a perfectly valid transaction. Whether the amount of the rent was excessive or not, I have no means of judging, and if I had I should not rely upon it, because I

(1) 10 Ch. D. 335. (2) 7 Ch. D. 138.

find this to have been a plain contract between the parties. If the distress was exercised for £8000, and that turns out to be more than was due to the mortgagees, they will have to refund the surplus to the debtor. That would be the only consequence. In my opinion the Appellants are entitled to the amount for which they distrained before there was any bankruptcy. There is no reason to suppose that the original contract was tainted, or is open to any suspicion that it was a contrivance to evade the bankruptcy laws. I think the Appellants are entitled to payment of what was due to them out of the £8000.

The appeal must be allowed: and the order of the Court below reversed, with costs both here and below.

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From this decision the trustees appealed. The appeal was heard on the 24th and 25th of June, 1880.

Upon the hearing of the appeal the counsel for the bank attempted to contend that a sufficient possession of the chattels in question had been taken by the bank before the act of bankruptcy to satisfy the *Bills of Sale Act*. But the Court held that this objection was not open, as it had not been taken before the Chief Judge, and moreover, that the evidence shewed that the bank had taken nothing but a formal possession.

Roxburgh, Q.C., and *T. A. Roberts*, for the Appellant:—

The rent reserved by the attornment clause is clearly a sham rent, and it is plainly a mere device to evade the bankruptcy law and the provisions of the *Bills of Sale Act*. The distress is therefore void as against the trustee in the liquidation: *Ex parte Williams* (1). In *In re Stockton Iron Furnace Company* (2) the Court was of opinion that the rent reserved was a fair one. It makes no difference as regards the present question whether the distress is put in before or after the commencement of the liquidation.

Horton Smith, Q.C., and *Whitworth*, for the bank:—

The bank insisted on the insertion of the attornment clause.

(1) 7 Ch. D. 138. (2) 10 Ch. D. 335.

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Ex parte Williams (1) is distinguishable. There the exorbitant amount of the rent was only one element in the case, and the mortgagees had done nothing to put the clause into operation before the commencement of the bankruptcy. In *Ex parte Hill* (2) Lord Justice *Cotton* said (3) that "if there was any one to whom rent was payable by a tenant, it was intended (by sect. 34 of the *Bankruptcy Act*, 1869) that he should be able to distrain for it, although he was not in the ordinary sense a landlord."

[COTTON, L.J.:—That is, if there was in reality a rent.]

Ex parte Mackay (4) was a different kind of case; a right was given to arise only in the event of the mortgagor's bankruptcy. In *In re Stockton Iron Furnace Company* (5) it was held that the attornment clause in a mortgage deed creates the relation of landlord and tenant between the mortgagee and the mortgagor. The bank obtained a right under the distress before any act of bankruptcy was committed by the debtor, and a right so obtained has never been interfered with by the Court except in the case of a fraudulent preference. *Ex parte Symmons* (6) is an illustration of this. The validity of attornment clauses in mortgage deeds has been long recognised, and the relation of landlord and tenant is thereby created. On principle, why should there be any limit to the amount of the rent agreed upon? Why should the bankruptcy of the tenant make any difference? *Jolly* v. *Arbuthnot* (7); *Morton* v. *Woods* (8). It is a mere question what the contract is. It can make no difference whether the goods are taken under a distress or under an execution. An execution levied before the act of bankruptcy would have been valid.

BAGGALLAY, L.J.:—

It is unnecessary, I think, to refer to the circumstances of the case in detail, as they have been sufficiently stated during the argument. At the time when the mortgage of the 27th of

(1) 7 Ch. D. 138.
(2) 6 Ch. D. 63.
(3) Ibid. p. 69.
(4) Law Rep. 8 Ch. 643.
(5) 10 Ch. D. 335.
(6) *Ante*, p. 693.
(7) 4 De G. & J. 224.
(8) Law Rep. 4 Q. B. 293.

February, 1877, was executed, it was not unlawful to insert in a mortgage deed that which is commonly called an attornment clause, and, the relation of landlord and tenant being thereby established between the mortgagee and the mortgagor, the power of levying a distress for rent in arrear became exercisable by the mortgagee, and, to the extent to which it was exercised, the mortgagee was enabled to treat the chattels of the mortgagor as forming a portion of his security, and in a sense, as the law then stood, to evade the provisions of the *Bills of Sale Act* of 1854. I say as the law then stood, because in *In re Stockton Iron Furnace Company* (1), to which I shall have occasion to refer more particularly presently, it was held that such a clause was not a license or authority to take possession of chattels within the intent and meaning of the *Bills of Sale Act*, 1854, which was then in force. But by sect. 6 of the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), "Every attornment instrument, or agreement not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." Now, as was pointed out by the Master of the Rolls in *In re Stockton Iron Furnace Company*, there was nothing unreasonable in the original introduction into mortgage deeds of attornment clauses in cases in which the mortgagor was in possession of the mortgaged premises. If the mortgaged premises had been occupied by a stranger, the mortgagee could at any time have demanded from him payment of his rent in arrear, and he could have applied any rent paid to him under such a demand in discharge in whole or in part of the interest in arrear on his mortgage, and, if the rent received by him was more than sufficient to discharge the interest, it could be applied in discharge or satisfaction *pro tanto* of the principal debt.

Now, so far as any inference can be drawn from the practice of

(1) 10 Ch. D. 335.

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inserting attornment clauses, it appears to me that the benefit to be derived by the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent, such as an ordinary tenant would be willing to give for the property under ordinary circumstances. That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision; not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bonâ fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that, though you may call it rent, it is no longer a real rent, but a fictitious payment under the name of rent.

Now, to pass from general propositions to the particular case before us, I do not entertain any doubt as to the honesty of purpose of the bank in having their mortgage security prepared in this form; it appears that their mortgage deeds usually contain an attornment clause of this character, and I should infer from this that they do not limit themselves to what would be a reasonable rent for the premises which are made the subject of it, but that they introduce an artificial sum sufficient to give them a satisfactory security upon the chattel property of the mortgagor. They could always make themselves safe by registering their mortgage as a bill of sale, but we know, as a matter of business, that that is found to be an inconvenient course. Debtors are unwilling to give securities of this kind if subject to registration as bills of sale. One can easily understand why a bill of sale of chattels is not registered. But if traders choose to omit registration, they and those who deal with them must take the consequences. At the same time justice must be done to them, and if the law enables them to carry out such transactions, effect must be given to them.

The Chief Judge seems to have been influenced by the decision of the Court of Appeal in *In re Stockton Iron Furnace Company* (1), which was not a bankruptcy case, but arose under the

(1) 10 Ch. D. 335.

Companies Act. That case came before him as Vice-Chancellor, and in it he appears to have adopted the idea that all attornment clauses in mortgage deeds were necessarily fraudulent and frauds upon the bankruptcy law. In the introductory part of his judgment he says (1): "From the description which has been given to me in evidence, I should doubt whether there was anything unfair in the stipulation of £5000 a year as the rent of these premises. But when I look at the deed I ask myself to what end could this proviso have been inserted in a mortgage deed, unless it was to avoid the provisions of the *Bills of Sale Act* and to provide for the mortgagees a remedy which when insolvency happened they could put in force." Therefore, in a case in which the rent reserved was not in excess of that which would have been a fair and reasonable rent for the premises, he still regarded the introduction of such a clause as a fraud upon the bankruptcy law. There was an appeal from that decision, and before the Court of Appeal three general points were raised, and I think it important to bear in mind what they were. The first was that the deed was a bill of sale as being an authority to take possession of chattels, and that it therefore required registration under the *Bills of Sale Act*, 1854. It was, however, held most distinctly—and by that decision, whether right or wrong, we are bound—that an attornment clause, such as that with which we are now dealing, was not a license or authority to take possession of chattels within the meaning of the Act. The next point was that any attornment clause was necessarily void as against the trustee in bankruptcy of the mortgagor, and that, apparently, was the view of the Vice-Chancellor, on the ground that the object was to enable the mortgagee in case of the mortgagor's bankruptcy to distrain for a year's rent, and thus obtain a preference over the other creditors. That point was met by the Master of the Rolls in this way (2): "It was said that the object of the mortgagors becoming tenants was repugnant to the bankruptcy law, for that the object was to enable the mortgagees in case of bankruptcy to distrain for the rent in arrear, and in that way obtain a preference. As regards one year's rent, which is all we are now considering, the 34th section of the *Bankruptcy Act*, 1869, gives the landlord that preference,

(1) 10 Ch. D. 344. (2) 10 Ch. D. 354.

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and therefore there is nothing in the law of bankruptcy to prevent his obtaining the benefit of it if he is a real landlord; and he is not the less a real landlord because he is mortgagee." That view was adopted by the other Judges, and the second point was decided adversely to the respondent. It was held that an attornment clause creates the relation of landlord and tenant, provided that there is a real tenancy, a real landlord, and a real tenant. Then the third point raised was this, that the rent reserved in the particular case was so excessive, so much beyond the real annual value of the property, that it never could have been intended that an actual tenancy should be created. In that case the rent was fixed at £5000, and on the evidence the Judges all came to the conclusion that it was not in excess of the real value, and the third ground upon which the respondent relied failed also. With reference to the point of excessive rent *Ex parte Williams* (1) was relied on, and had the Judges been of opinion that the £5000 rent which was fixed by the attornment clause was excessive in the sense in which the Court would consider it excessive, I cannot for one moment doubt that the decision would have been in favour of the Respondent upon the third point, though upon the other two points he would have failed.

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The observations of Lord Justice *James* at the commencement of his judgment shew that such would have been the result. He said (2): "As to the case of *Ex parte Williams*, which has been called to our attention, I entirely reaffirm, if it were necessary to reaffirm, everything that was there said. If the rent had, as in that case, been of such an absurd amount that it could never have been intended to have been a rent, but must have been intended as part of a device to enable the mortgagee to get something in bankruptcy which he would not otherwise get, the principle of that case would have been applicable." Well, what were the circumstances of *Ex parte Williams*, in which it was held that the rent was so absurdly in excess of the real value of the premises that it could not be regarded as a real rent or a real attornment clause between the parties, but that it was a provision inserted to enable the mortgagee to get possession of the chattels of the mortgagor whenever, either in consequence of his principal or interest getting

(1) 7 Ch. D. 138. (2) 10 Ch. D. 356.

into arrear, or by reason of the mortgagor's bankruptcy, it might be desirable for him so to do? In that case the amount of the debt was £55,000; the annual value of the property was admitted to be only £3000, and in order to give a better security to the mortgagee and to enable him to take the chattels when it should become necessary to do so, the rent was fixed at £20,000. There was no actual distress in that case, but application was made after the bankruptcy for leave to distrain, and it was held that, though, as is shewn by *In re Stockton Iron Furnace Company* (1), had there been a reasonable rent reserved by the attornment clause, effect would have been given to it and leave given to distrain, yet, inasmuch as instead of there being a reasonable rent of £3000 a year, there was a fictitious rent of £20,000 placed upon the property, the Court considered that there was not a real intention to create a tenancy, but that the clause was a mere device to enable chattels on the mortgaged property to be taken by the mortgagee in case of the mortgagor's bankruptcy in preference to the other creditors. It appears to me that, when once we have arrived at the true view of *Ex parte Williams* (2) as explained by the decision in *In re Stockton Iron Furnace Company*, we have only to apply the same principles to the present case. And what do we find here? We find that there was a debt of something like £7000 in round numbers, which it was contemplated might be raised to £8000, and a mortgage security is given of certain property, including the chattels upon it, for the whole amount of the debt, whatever it might be, upon the balance of the mortgagor's current account. An attornment clause is introduced, fixing as the rent for the mortgaged premises the full possible amount of the principal and interest, having regard to the stamp upon the deed, namely, £8000, fixing £8000 as the rent of the property the annual value of which was sworn to (and the evidence is not contradicted) as only £140 per annum. If a rent of seven times the the real value, as in *Ex parte Williams*, was so excessive as to lead the Court to consider it absurd, what shall be said when in the present case the reserved rent is more than fifty times as much as the real value? It appears to me that the case comes clearly within the principle of *Ex parte Williams*, and that we

(1) 10 Ch. D. 335. (2) 7 Ch. D. 138.

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cannot regard the attornment clause as having been introduced for the proper purpose of such a clause, viz., to create a reasonable tenancy between landlord and tenant, but that the object was to enable the mortgagees to put their hands upon chattels of considerable value, apparently far in excess of the annual value of the premises, whenever in the exigencies of the case it should be desirable for them to do so.

Now, the case of *Morton* v. *Woods* (1) has been referred to on behalf of the Respondents, and the view presented by their counsel, as I understand it, is this: that it is quite immaterial what the amount of rent is which you place upon the premises by an attornment clause; you are at liberty to make it as unreal as you choose, to cover the whole principal and interest, if you think fit, and the Court will not interfere with it. But *Morton* v. *Woods* does not decide that. It decides that, as a general rule, an attornment clause is not in itself unlawful, provided it is real. The rent need not be limited to the amount of interest from time to time becoming due upon the mortgage debt. It is not introduced for that purpose alone, although it is one way of securing the interest. The measure of the real rent is the lettable value of the property, not the amount of the mortgage debt. In *Morton* v. *Woods* there was no suggestion that the rent fixed by the attornment clause was other than the real and proper rent, and, as I read the case, all that the Court decided was the general principle that effect will be given to attornment clauses when they are real and carry out the true intention of the parties to them, so far as that intention is limited to creating the relation of landlord and tenant in the proper sense. I am of opinion, therefore, that the distress was invalid, and that the trustees are entitled to the proceeds of the chattels which were seized.

COTTON, L.J.:—

I also am of opinion that the order appealed from cannot be maintained.

We have to decide who is entitled to the proceeds of certain chattels which were the property of the bankrupt at the time of the distress.

(1) Law Rep. 4 Q. B. 293.

Have the bank by the distress gained any title to the goods? It was argued by the Respondents that a reversal of the decision of the Chief Judge would be a contradiction of a number of cases which establish the validity of an attornment clause as between mortgagor and mortgagee, and authorities were cited on the general proposition that there may be, as against assignees or trustees in bankruptcy, valid attornment clauses, so as to give a right of distress to the mortgagee. Undoubtedly, a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee, and thus by contract constituting the relation of landlord and tenant between the two. Under such circumstances, where it is a real and not a fictitious or sham arrangement, the ordinary consequences of a tenancy follow, and there can be a distress for the rent agreed upon, which will be valid and effectual in the case of bankruptcy. As has been pointed out by Lord Justice *Baggallay*, this is quite reasonable, for the mortgagee has a right to take possession and to turn out the mortgagor, whether he is in possession by himself or by his tenant. If the mortgagor is in possession by a tenant, then the rent which that tenant pays comes into the hands of the mortgagee. If the property is in the possession of the mortgagor himself, the mortgagee may turn him out and let the property, either to a stranger or to the mortgagor; and, therefore, there is nothing unreasonable, or that can be called a fraud on the law of bankruptcy, in allowing the parties to make a contract in the mortgage deed which they might validly and effectually make afterwards. If the mortgagee lets to a third party, no question can arise as to the amount of the rent; and if the attornment clause is one which really constitutes the relation of landlord and tenant between the mortgagor and mortgagee, the Court will not be nice in considering whether the rent is too great for the mortgaged property. But it is a very different question which we have now to consider—viz., whether there is a real, or only a fictitious or ostensible contract to constitute the relation of landlord and tenant. On that question the amount of the rent created may be most material; it may be so excessive as to afford, even of itself, a probability that that which is in form a contract constituting the relation of landlord and tenant, and reserving a return for the use of the property, was

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not so in substance and fact, but was a mere colour in order to cover something else. Nor is it material how the rent, if it be rent, is to be applied. No doubt the rent may be sufficient to cover the interest, but, if it is more than sufficient to cover the interest, and is received by the mortgagee, he must apply it in reduction of the capital, subject to the question whether the interest was in arrear at the time when he took possession, for as against a mortgagee in possession, when the interest is not in arrear an account would not be taken with annual rests. Therefore, the stipulation that a rent fairly reserved, a real rent, is to be applied in paying the principal and interest of the mortgage debt, cannot avoid a contract which in other respects is a real contract, and not a mere device to cover something else.

In the present case what do we find? In the first place the amount of the so-called rent is the whole sum which was covered by the stamp upon the mortgage deed, and it was about £1500 in excess of what appeared to be due upon the mortgage. So that if the power of distress had been effectually exercised, and there had been enough to satisfy the rent reserved by the deed, the relation of mortgagor and mortgagee between the parties would be entirely at an end. Can it be supposed that this contract entered into between the mortgagor and mortgagee, stipulating for a tenancy from year to year, was really intended as a contract that the mortgagor should remain in possession as tenant to the mortgagee, giving a fair return for the land, when a distress for the so-called rent would at once have put an end to the security?

There is another view of the case. All these chattels were comprised in the assignment contained in the deed, and but for the *Bills of Sale Act* they would no doubt have been an effectual security to the mortgagees, even in the event of the mortgagor's bankruptcy. But, as the bill of sale was not registered, in the event of bankruptcy those chattels would not have been an effectual security at all. Must we not come to the conclusion that the stipulation for rent was an attempt to give the mortgagees, as a legal incident to rent, a power of distress, so as to cure the defect in the security arising from its non-registration as a bill of sale, and thus to make effectual as a security to a particular creditor of

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the bankrupt that which, but for the supposed legal incident of distress for the so-called rent, would have gone to the general body of the creditors?

Under these circumstances the conclusion to which I come is this, that there was no real rent though a sum was stipulated for under the name of rent. But it was not a rent in respect of which the legal incident of distress arises, and therefore on the ground that there was no legal right to distrain, the bank under their distress have not got any title to these goods which, unless there has been an effectual distress, remained the property of the bankrupt. And I go further than that. No doubt any distress which is exercised does give to a mortgagee, if he is a landlord, something which he would not have got if he had not exercised it. But yet it must be a distress for a real rent to which the law has annexed as an incident the power of distress. When there is no real rent, but something called rent which in fact is not rent, then, in my opinion, the clause which attempts to give the power of distress incident to rent in respect of that which is not rent, and thus to give to a mortgagee a right which he would only have as landlord and not as mortgagee—to give it to him as mortgagee and not as landlord—is an attempt to alter and disturb the legal distribution of the mortgagor's property in bankruptcy. It is what is called a fraud upon the bankruptcy law. I do not for one moment suggest that any fraud was intended on the part of the bank; but it is a thing not allowed by the general policy of the law to attempt to avoid the provisions of the *Bankruptcy Act*, and in that sense it is a fraud upon the bankruptcy law. The clause is a fraud upon the bankruptcy law or an evasion of the bankruptcy law. Upon that ground and the other ground which I have stated, that, there being no real rent or real relationship of landlord and tenant, no legal power of distress existed, the claim of the bank, in my opinion, fails.

I wish to say a word as to the authorities. Where there is principle I do not require authority, but there ought to be no disturbance of recognised authority. I need not further observe upon the cases which have been referred to by Lord Justice *Baggallay* as merely establishing the validity of an attornment clause in a mortgage deed where there is the real relation of

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landlord and tenant; they are in no way affected by our present decision. Two other cases were mainly relied upon. I do not rely upon the actual decision in *Ex parte Williams* (1) as governing the present case, because I agree with the Respondents' counsel that that decision is in a great degree attributable to the fact that upon the very face of the deed it was apparent that the attornment clause was introduced to meet the case of bankruptcy, though it was not restricted to that. But the principles laid down by Lord Justice *James* and Lord Justice *Thesiger* are, I think, good law and do govern this case. Lord Justice *James* said (2), "It appears to me that the attornment clause was a mere sham, a mere contrivance and device to give the mortgagee an additional benefit in the event of the mortgagors' bankruptcy." In my opinion, in the present case, calling this sum rent was a mere sham, an attempt to give to the bank as mortgagees that which could only properly be given to them as landlords, which they were not really constituted by this clause. And therefore the clause is bad, and, as Lord Justice *Thesiger* said in *Ex parte Williams*, the 34th section of the *Bankruptcy Act* refers to a real *bonâ fide* rent and not to that which is only rent in name. Here there was no real rent and no real relationship of landlord and tenant, and therefore there was no power of distress. The other case that was referred to, *In re Stockton Iron Furnace Company* (3), is no authority against our present decision, for the reasons which have been already pointed out by Lord Justice *Baggallay*. I think the Chief Judge was induced to decide as he did by thinking that he was following the decision of the Court of Appeal in that case, although, in my opinion, that decision was founded on the rent being a fair rent and constituting the relation of landlord and tenant, and does not touch the present case.

THESIGER, L.J.:—

The question is whether an attornment clause contained in a mortgage deed was valid and operative, and capable of supporting, as against the trustee in bankruptcy of the mortgagor, a distress

(1) 7 Ch. D. 138. (2) 7 Ch. D. 143.
(3) 10 Ch. D. 335.

which was put in before the bankruptcy. I will deal first with the matter which, as it appears to me, is not open to doubt, and certainly has not been made the subject of dispute in this case, viz., the principles relating to attornment clauses generally. There can be no doubt that such clauses contained in mortgage deeds are valid and operative in themselves, and that they may, and ordinarily do create the relationship of tenant and landlord between the mortgagor and mortgagee, and with it the ordinary right of distress which the law attaches to that relationship. And, more than that, it appears to me abundantly clear, both upon principle and authority, that attornment clauses will be valid and operative, although the rent reserved by them may be considerably in excess of what may be required to keep down the interest on the mortgage debt. I can even imagine a case in which the rent reserved may be sufficient to pay both principal and interest. But, while that is so, it must also be admitted that the object of attornment clauses is, while giving an additional security to the mortgagee, to place him, as regards the mortgagor who is left in possession of the property, and, in the matter of rent, in the same position in which he would have been if the mortgaged premises had been under lease to a third party. Therefore, although it is clear that persons may bargain with each other as to the amount of rent, and the Courts will not lightly interfere with bargains so made, it is obvious, looking at the nature of these clauses and the object with which they can be legitimately inserted in mortgage deeds, that the amount of the rent may, under certain circumstances, become a matter very important to consider in order to determine whether they are real attornment clauses, whether the rent fixed is a real rent, and whether a real tenancy has been created. That I understand to be the rule laid down by the authorities which have been cited. Granted that these attornment clauses are valid and operative under ordinary circumstances, yet, if from the terms of the particular deed, or from the amount of the rent fixed by the attornment clause, it can be concluded by the Court that the rent is not a real rent but a mere sham, that the tenancy is not a real tenancy but a mere sham, and that the attornment clause is a mere device to give the mortgagee a hold, in the event of bankruptcy, over the goods and chattels

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of the mortgagor, which would otherwise have been distributed amongst his general creditors, then the attornment clause is invalid and inoperative, because it is a fraud upon the bankruptcy law. That I understand to be the principle of the decisions in *Ex parte Williams* (1) and *In re Stockton Iron Furnace Company* (2). It is true that Lords Justices *James* and *Baggallay* did not, in their judgments in *Ex parte Williams*, in terms dwell upon the disproportionate amount of the rent reserved in that case, and that they did (certainly Lord Justice *James* did) rely as the main ground of the decision upon the principle laid down in *Higinbotham* v. *Holme* (3), that there was an arrangement by which a distribution was to be made of the mortgagor's property, in the event of his bankruptcy, different from that which would have been made if there had been no bankruptcy. That was the main ground upon which Lord Justice *James* proceeded. It is clear, however, from what he said in *In re Stockton Iron Furnace Company*, that in the earlier case there had been present to his mind, as one of the elements which led him to his conclusion, the disproportion between the rent reserved and the real value of the property. At all events, in *Ex parte Williams* upon that fact, coupled with the other circumstances, the Court came to the conclusion that the rent was a mere sham one, and therefore could not support the distress. Certainly in *Ex parte Williams* I rested my judgment upon the fact that the rent was a sham one. I used these words (4): "It seems to me that sect. 34 is in no way inconsistent with the general law of bankruptcy, that, according to its true meaning, what the Legislature intended to protect was a real *bonâ fide* rent, and that the section has no application to a case like the present where the rent is a mere device by which the mortgagee is, in the event of the mortgagor's bankruptcy, to obtain a security upon chattels which have not been assigned to him by any bill of sale, and which but for this device would be distributed among the other creditors of the mortgagors." And the Master of the Rolls, in *In re Stockton Iron Furnace Company* (5), said: "The first question to be considered is whether there was

(1) 7 Ch. D. 138.
(2) 10 Ch. D. 335.
(3) 19 Ves. 88.
(4) 7 Ch. D. 144.
(5) 10 Ch. D. 335, 353.

any tenancy at all, or, as it has been put in the argument for the Respondents, any *bonâ fide* tenancy."

That being the question, let us compare the facts of those two cases with the facts of the present case. In *In re Stockton Iron Furnace Company* (1) advances had been made, or were to be made, to the extent of £50,000, and the stamp upon the mortgage deed would allow of a security for advances to that extent. The rent secured by the attornment clause was £5000, and although no doubt there was some evidence that that rent was more than the property would properly bear, there was, on the other hand, strong evidence that it was only a fair rent. Applying, as they did, the principles laid down in *Ex parte Williams* (2), the Court came to the conclusion that it was not a sham rent or a sham tenancy, but a real rent and a real tenancy. In *Ex parte Williams*, on the other hand, there was a rent of £20,000, and the advances would not exceed £55,000. It was admitted that the property was not worth more than £3000, or somewhere about one-seventh of the sum reserved in the shape of rent. That was considered so disproportionate to the value of the property, that from the disproportion alone the Court might infer that it was not a real rent, and it must not be forgotten in these cases that, in dealing with the question whether a tenancy is a real one, the rights of the mortgagee himself have to be considered. Though, in the event of bankruptcy, it may be very pleasant for him to sweep off as against the general creditors all the goods and chattels of the mortgagor, questions as to wilful default might arise between the mortgagee and a second mortgagee, when it might be very much to the disadvantage of the first mortgagee to contend that the rent was a real one.

Now, take the present case. Instead of the rent reserved by the attornment clause being seven times as great as the real value of the property, we have a rent reserved fifty-seven times as great as the fair letting value of the premises. The rent reserved is the whole amount which the stamp upon the deed would allow to be secured by it, namely, £8000. Consequently, it was open to the mortgagees to fold their hands, and to allow the mortgagor to go on obtaining credit upon the faith of his possession of his

(1) 10 Ch. D. 335. (2) 7 Ch. D. 138.

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goods and chattels, subject to the ordinary right which a landlord has of distraining for rent, which is usually a legitimate rent, and then, when bankruptcy took place, to step forward and sweep away by a distress for one year's rent (which, under the circumstances, was quite enough for the purpose) the whole of the chattels which they might find on the premises in order to pay their debt. In this respect there is a very great distinction between the harm which is done by an unregistered bill of sale, and that which may be done by these attornment clauses. It is perfectly true that if the grantee of an unregistered bill of sale can get hold of the goods of the grantor in proper time before his bankruptcy and take them out of his possession or apparent possession, he may, notwithstanding the want of registration, hold the goods against the trustee in bankruptcy of the grantor. But there is great danger that he will not be in time, and we, in fact, find day after day that grantees under unregistered bills of sale are not in time; the bankruptcy may come too soon, or the possession taken may be too much of a formal character to enable the grantee to retain the goods. But under an attornment clause there is no necessity for the mortgagee to take possession at all before the bankruptcy, if he is only wise enough (in the present case, as it turns out, foolish enough), to fix such a rent as will cover every possible amount of principal and interest, for he would say, under sect. 34, You must pay me a year's rent, and you must, therefore, pay me my principal and interest.

So much for the facts and the general law. One word as to a distinction which it has been attempted to draw between the present case and *Ex parte Williams* (1) and *In re Stockton Iron Furnace Company* (2). It is said that in *Ex parte Williams* the distress was not put in until after the bankruptcy, and that in *In re Stockton Iron Furnace Company*, although in fact the distress was put in before the bankruptcy, the case was treated as one depending on the 34th section, and therefore the point was not actually decided by the Court. But, although in my judgment in the earlier case I alluded especially to the 34th section, in the judgments of the other members of the Court no allusion was made to that section, and the main question dealt with was, not whether by

(1) 7 Ch. D. 138. (2) 10 Ch. D. 335.

virtue of a distress before or a distress after the bankruptcy, the goods and chattels could be obtained under the attornment clause, but whether the attornment clause was valid and operative, and that really seems to me to be the principle upon which the matter must be decided. The question is whether for any purpose there was a real rent or a real tenancy. I give no opinion what might have been the result if there had been an express license to the mortgagees to take possession of the chattels. Very possibly questions might have arisen under the *Bills of Sale Act.* But here the right of distress can only be supported upon the ordinary principles of law which attach that right to a legitimate tenancy with a legitimate rent. If once you arrive at the conclusion that there is no tenancy and no rent, but that the attornment clause creates only a sham tenancy and a sham rent for purposes such as I have described, then it follows that no distress can by the ordinary principles of law be attached to such a tenancy in respect of such a rent, and for that reason it appears to me that no legitimate distinction can be drawn between a distress levied before and a distress levied after bankruptcy.

Upon all these grounds I am of opinion that the decision of the Chief Judge cannot be supported, and that the appeal must be allowed.

Horton Smith asked for leave to appeal to the House of Lords, urging that the amount at stake was large and the point important, because such attornment clauses have been in general use.

He referred to *Ex parte Attwater* (1); *Ex parte Hayman* (2); *Bankruptcy Act,* 1869, s. 71.

[BAGGALLAY, L.J., referred to *In re Calthrop* (3).]

BAGGALLAY, L.J.:—

We do not think we should be justified in granting leave to appeal. Though the same limitations and requisites are not to be found in the present *Bankruptcy Act* as existed under the Act of 1849, we think we ought to act upon similar principles. And,

(1) 5 Ch. D. 27, 33. (2) 8 Ch. D. 11, 26.
(3) Law Rep. 3 Ch. 252, 256.

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speaking for myself, I am bound to say that I do not entertain the slightest doubt as to the correctness of the decision at which we have arrived.

COTTON and THESIGER, L.JJ., concurred.

Solicitors for Trustees: *Helder, Roberts, & Gillett,* agents for *Brockbank, Helder, & Brockbank, Whitehaven.*

Solicitors for Bank: *Johnston & Harrison,* agents for *T. Brown, Whitehaven.*

C. A. 1880 *April* 16, 26, 27.

MASSAM *v.* THORLEY'S CATTLE FOOD COMPANY.

[1878 M. 95.]

Secret Process of Manufacture—Right to Use of Name.

Joseph Thorley for many years manufactured and sold extensively an article called "*Thorley's Food for Cattle*," made according to a recipe communicated to him and not known to the public, and down to his death he was the only person who made it. His executors continued the business. Shortly after his death a company was formed by other persons under the name of *J. W. Thorley's Cattle Food Company*, in which *J. W. Thorley*, a brother of *Joseph Thorley*, took a 1s. share. *J. W. Thorley* had been employed by *Joseph Thorley*, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "*Thorley's Food for Cattle*":—

Held (reversing the decision of *Malins*, V.C.), that the company were not at liberty to use the name "*Thorley's Food for Cattle*" unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of *Joseph Thorley*.

James v. *James* (1) observed upon.

THIS was an appeal from a judgment of Vice-Chancellor *Malins*.

The action was by the executors of *Joseph Thorley* for an injunction to restrain the Defendant company, their servants, &c., from selling, exporting, or shipping, or causing, or procuring, or allowing to be sold, shipped, or exported, and from in any manner representing, or causing or procuring to be represented, any goods manufactured or sold by the Defendant company as the manu-

(1) Law Rep. 13 Eq. 421.

facture or goods of the late *Joseph Thorley*, or of the Plaintiffs, his trustees and successors in business.

In 1855 *Joseph Thorley* commenced manufacturing cattle food according to a recipe which he had obtained from a person of the name of *Fawcett*, and during his life it appeared that he was the sole manufacturer of it. It was extensively sold under the title of "*Thorley's Food for Cattle.*" His brother, *J. W. Thorley*, was employed by him in the business, and knew the secret of the manufacture, but left the employment of *Joseph Thorley* about ten years before the death of *Joseph Thorley*, and took to other business. *Joseph Thorley* died in November, 1876, and after his death the Plaintiffs continued his business.

In March, 1877, the Defendant company was registered as a limited company, with a nominal capital of £200, divided into 4000 shares of 1*s.* each, *J. W. Thorley* signing the memorandum of association for one share. The articles provided that the directors were to enter into an arrangement with *J. W. Thorley* for the purchase of the secret of the manufacture, and for his employment in the business of the company.

The company proceeded to manufacture and sell the food under the name of "*Thorley's Food for Cattle.*" They sold it in packets of the same size and colour in which the Plaintiffs' food was sold, labelled "*Thorley's Food for Cattle,*" and so far similar in appearance to the Plaintiffs' packets, that although when placed together they could without difficulty be distinguished, a purchaser seeing one of the Defendants' packets separately might easily mistake it for one of the Plaintiffs'. Directions as to the use of the condiment were pasted upon each packet of the Defendants' manufacture, very closely resembling the directions pasted on the Plaintiffs' packets. *Joseph Thorley* during his life published an almanack, called "*Thorley's Farmers' Almanack,*" containing a report from Dr. *Hassall*, and various testimonials to the excellence of the food. The Defendant company published a very similar almanack, called "*The Farmers' Diary and Almanack for* 1878," also containing Dr. *Hassall's* report, and stating various facts as to prizes and certificates of merit awarded in respect of the food, which had in fact been awarded in respect of the food manufactured by *Joseph Thorley*. At the trial a great deal of evidence

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was gone into as to the statements made by the Defendants' travellers. The witnesses on behalf of the Plaintiffs stated that from the representations made to them by the travellers employed by the Defendant company they were led to believe that the Defendants were carrying on the business of the late *Joseph Thorley* as his successors, and under that impression they gave orders to such travellers; and some of the witnesses upon finding that they had been deceived returned the goods so ordered by them. On the other hand, the directors of the company stated very positively that they had given instructions to their travellers to make no statement which could imply that they were carrying on *Joseph Thorley's* business, but simply to represent that *Joseph Thorley* was dead, and that his brother, *J. W. Thorley*, had formed a company for the manufacture and sale of *Thorley's Food for Cattle*. The travellers themselves gave evidence that they had strictly carried out the instructions given them, and had in no instance represented that *J. W. Thorley's Cattle Food Company* were carrying on the business as successors to *Joseph Thorley*.

Before the company had commenced business the Plaintiffs commenced an action to restrain them from carrying on business under prospectuses so contrived as to represent the business carried on by the company as being the business of the Plaintiffs, or the goods manufactured or sold by the company as being goods manufactured, sold, or supplied by the Plaintiffs. A motion for an injunction was heard by Vice-Chancellor *Malins* on the 14th of June, 1877, and refused (1). The Plaintiffs thereupon discontinued their action, but in the following year commenced the present action.

The action was tried before Vice-Chancellor *Malins* on the 14th, 15th, 17th, 18th, 19th and 20th of November, 1879, and was dismissed. His Lordship's judgment turned on an elaborate examination of the evidence as to the representations made by the travellers of the company, all other questions being treated as concluded by his Lordship's decision on the motion in the former action.

The Plaintiffs appealed. The appeal came on to be heard on the 16th of April, 1880.

(1) 6 Ch. D. 574.

Glasse, Q.C., and *Nalder*, for the Appellants:—

This case is within the class of which *Churton* v. *Douglas* (1) is a type. The company evidently intended to sail as near the wind as possible, and as far as they could to lead the public to believe that they were carrying on *Joseph Thorley's* business. Admitting, for the purposes of argument, that they could use the term "*Thorley's Food for Cattle*," they had no right to represent that they were carrying on the old business, or to lead the public to believe when buying their goods that they were buying goods manufactured by *Joseph Thorley's* successors; and they could not use the name unless they took precautions to prevent the public from being misled by the use of it.

Higgins, Q.C., and *Townsend*, for the company:—

We submit that the matter is *res judicata*. The Plaintiffs brought a former action on the same case, and an injunction being refused they discontinued it, and cannot now bring forward the same case again. On the merits we say that we are doing nothing more than manufacturing the same article which the Plaintiffs sell, and we are selling it under its name of commerce. We rely on *James* v. *James* (2); *Burgess* v. *Burgess* (3). The differences in our labels, &c., are enough to prevent purchasers from being misled: *Blackwell* v. *Crabb* (4).

JAMES, L.J.:—

In the first place I will dispose of the question whether there is anything in the nature of an estoppel or of a bar to the Plaintiffs' right to relief by reason of their having discontinued their former action against the company. The Plaintiffs having failed to get an interlocutory injunction, discontinued that action and paid the costs. That is not a *res judicata*, nor can it be pleaded or dealt with as *res judicata*. All it amounts to is that the Vice-Chancellor did not then think that a case had been made out for the interference of the Court upon interlocutory application, though his Lordship gave reasons in his judgment chiefly based upon *James* v. *James*, which went against the Plaintiffs having any right

(1) Joh. 174. 5 Jur. N.S. 888
(2) Law Rep. 13 Eq. 421.
(3) 3 D. M. & G. 896. 17 Jur. 292.
(4) 36 L. J. (Ch.) 504.

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to relief at all. I am of opinion that that application for an injunction, assuming the facts to have been, as we are told they were, substantially the same as the facts now before us, ought to have succeeded, because I am clearly of opinion that the Defendant company never had a right to use the term "*Thorley's Food for Cattle.*"

The right to use that name is claimed on the ground of what was supposed to have been decided in *Burgess* v. *Burgess* (1), and was afterwards decided in *James* v. *James* (2). Now *Burgess* v. *Burgess* has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article whatever may be the consequences of it, or whatever may be the motive for doing it, or whatever may be the result of it. No doubt the epigrammatic character of the judgment of the Lord Justice *Knight Bruce* has caused it to be recollected more than that of the Lord Justice *Turner* who followed him. Lord Justice *Knight Bruce* in his judgment said (3): "All the Queen's subjects have a right if they will to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers, nor is there anything else that this Defendant has done in question before us. . . . He carries on business under his own name and sells his Essence of Anchovies as '*Burgess's Essence of Anchovies,*' which in truth it is. If any circumstance of fraud now material had accompanied and were continuing to accompany the case it would stand very differently, but the whole case lies in what I have stated." But the way in which Lord Justice *Turner* puts it is this, which I take to be much more accurate: "I concur in the opinion that this motion should be refused with costs. No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the Defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses

(1) 3 D. M. & G. 896. (2) Law Rep. 13 Eq. 421.
17 Jur. 292 (3) 3 D. M. & G. 903. 17 Jur. 293

it to represent the goods sold by himself as the goods of the person whose name he uses, but where the Defendant sells goods under his own name, and it happens that the Plaintiff has the same name, it does not follow that the Defendant is selling his goods as the goods of the Plaintiff. It is a question of evidence in each case whether there is false representation or not."

That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in *Wotherspoon* v. *Currie* (1), in which the House of Lords differed from the view that I had taken in that case. I thought myself bound to apply what I considered to be the rule laid down in *Burgess* v. *Burgess* (2), and some other cases which seemed to have followed it, that a man had a right to use any name so long as he was making no misrepresentation. There the Defendant put upon his labels "*Currie & Co.*, Starch and Corn Flour Manufacturers, *Glenfield*." The Plaintiffs' starch was well known as *Glenfield Starch*. The Defendant was actually manufacturing starch at *Glenfield*, having gone thither for the purpose of enabling him to say that he was manufacturing it at *Glenfield*. The House of Lords said the mere fact that he was really carrying on his manufacture at *Glenfield*, and was not therefore telling a lie, did not exempt him from the consequence of the fact that his proceedings were intended and calculated to produce on the mind of the purchasers the belief that his article was the article of the Plaintiffs. Lord *Westbury* sums it up in a few words (3): "I take it to be clear from the evidence that long antecedently to the operations of the Respondent the word '*Glenfield*' had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the Appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred. The word '*Glenfield*,' therefore, as a denomination of starch, had become the property of the Appellants. It was their right and title in connection with the starch. Now, the question is, has that property been invaded by the Respondent? I take the whole proceedings of the Respondent, from beginning to

(1) Law Rep. 5 H. L. 508. (2) 3 D. M. & G. 896.
(3) Law Rep. 5 H. L. 521.

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end, to be nothing in the world more than a contrivance for the purpose of getting the word '*Glenfield*' associated with his manufacture. If that be true, what the Respondent has done has been done *malo animo* with a view of possessing himself of the denomination which was the property of the Appellants."

I wish to say a few words on the case of *James* v. *James* (1), by which the Vice-Chancellor in this case considered himself bound. There may be a distinction which I am going to point out between that case and this, but if they be practically the same, which I am bound to say I think they are, I cannot, speaking for myself, concur in the decision in *James* v. *James*, nor in the reasoning which led to it, nor in the distinctions which were there attempted to be taken. In that case Lieutenant *James* had invented a horse blister, known as *Lieutenant James's Horse Blister*. It was manufactured by himself, and he conveyed it to persons upon trust for some members of his family. Another person of the name of *James*, a member of the family, made it after the death of Lieutenant *James* and sold it under the same name. The Master of the Rolls was of opinion that, although during the lifetime of Lieutenant *James* that could not be done, it could be done after his death. I am utterly unable to perceive any ground for that distinction. If Lieutenant *James* had during his life a right equivalent to a trade-mark, viz., the right to prevent anybody of the name of *James*, or otherwise, from selling *Lieutenant James's Horse Blister*, I cannot conceive how that right should not be transmissible to his legal personal representatives. It is possible that the Master of the Rolls may have thought that *Lieutenant James's Horse Blister* being a mere recipe, anybody who had got the recipe might go and get it made up by any chemist or druggist, and therefore that the name "*Lieutenant James's Horse Blister*" was merely an indication that it was made according to Lieutenant *James's* recipe, in which I am bound to say I should be unable to concur. But, assuming that distinction to be sound, I cannot apply that principle to a case like the present, where two people could make the article from the same recipe, and yet make articles as dissimilar as possible in point of quality. Of course where we are dealing with an article of food, the merit and

(1) Law Rep. 13 Eq. 421.

value of the article greatly depend on the care taken in selecting the very best qualities of the articles to be compounded, and in the manipulation of the articles and the preservation of them during the course of manufacture. But I do not think that there is any substantial difference between the two cases. What probably was in the mind of the Master of the Rolls at the time, and led to the fallacy, was this: there is no doubt that if a man takes out a patent for a thing, and the thing is known as his patent article, for instance, say "*Flavell's Patent Kitchener*," and the patent expires, then anybody else may make the thing and sell it as *Flavell's Patent Kitchener*, because then "*Flavell's Patent Kitchener*" does not mean made by *Flavell*, but made according to *Flavell's* patent.

What are the circumstances in this case? In the first place, the article was not invented by any *Thorley*, and therefore "*Thorley's Food*" cannot signify a food made according to *Thorley's* invention. The recipe is said to have been purchased by the original *Thorley*, and "*Thorley's Food for Cattle*," here, according to my view, does not mean food consisting of particular ingredients, or made up according to a particular recipe, because no purchaser would know or care about that. "*Thorley's Food for Cattle*" meant that food which for many years was manufactured at works belonging to *Joseph Thorley*, and afterwards was manufactured by his executors carrying on his business at the same works. The words "*Thorley's Food for Cattle*" would, according to my view of the case, indicate to a purchaser this, "You have always had a very good article called '*Thorley's Food for Cattle*,' if any article bears that name that is to you a guarantee that it comes from the same place from which that has come with which you have hitherto been well satisfied." That, in truth, is the meaning and object and result of a trade-mark. It indicates this, that you may take this as a warranty that it has come from the particular manufacturer of the goods with which you have been hitherto pleased. "*Thorley's Food for Cattle*" had never become an article of commerce as distinguished from the particular manufactory from which it had proceeded. I may refer by way of illustration to a case which was the converse of this case, a case where *Liebig's Extract of Meat Company*, having got *Liebig* to

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assist them and lend them his name, sought to prevent the Defendants from selling anything under the name of *Liebig's Extract of Meat*. The answer was that *Liebig's* extract of meat had ceased to be a thing made by *Liebig*, because *Liebig* had published to the world the mode by which it was made, and it had been made and manufactured and had got into the Pharmacopœia and into books of cookery, and had become as much known as if it were called simply extract of meat, and had therefore ceased to have any connection with *Liebig* as the maker of it for the purpose of the manufacture. There is nothing like that in this present case.

Then we have to consider what was the *animus* of the company. We have had nothing like a satisfactory explanation of how *J. W. Thorley's* company came into existence, unless it was that the promoters thought that *Thorley's* food was a very profitable thing and had got a great reputation, and that they should like to steal the reputation which it had acquired. In order to do that they somehow or other got into communication with a brother of the late *Joseph Thorley*, who for some years had been in the service of *Joseph Thorley*, and during those years, according to his own account, which I take to be true, had acquired a knowledge of the recipe and of the manufacture, but who, for several years previous to the existence of this company, had never had anything to do with the manufacture of food for cattle. Having the name of *Thorley*, which was the distinguishing mark of the food for cattle, he either tendered himself for sale or was found for purchase by some persons in order that his name might be got into a joint-stock company formed for the sake of selling these goods. Why was that name got in there except for the purpose of inducing the world to believe that it was the same concern, or that it was the *Thorley*, that it was the same *Thorley*, or a continuation of the same *Thorley*, whose name was the principal characteristic of the name of the article? The name of the company is to my mind a fiction. The meaning which the name of "*J. W. Thorley & Co., Limited*," would convey to any person's mind is that there had been a partnership of *J. W. Thorley & Co.*, a real partnership which had been carrying on business in the manufacture of this food for cattle, and that for some reason or

other, such as we have seen constantly in our experience in this Court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business. But here *J. W. Thorley* was not a partner. *J. W. Thorley* was employed as an agent, as the manager, and *J. W. Thorley's* only connection with company, *qua* company, is that he had a 1*s.* share in this company. To my mind that is the same thing as if somebody were to get up a brewery at *Burton*, finding somebody of the name of *Bass*, or somebody who would take the name of *Bass* (for there is no law to prevent a man assuming any name he likes) and then get a company registered under the name of "*J. Bass & Co., Limited*," or "*W. Bass & Co., Limited*," and advertise "*Bass & Co.'s Pale Ale.*" I really can see no distinction between "*Bass & Co.'s Pale Ale*," as advertised by such a company, and "*Thorley's Food for Cattle*," advertised by the company now before us, which has procured a person of the name of *Thorley* to be connected with their company. That of itself to my mind is a very strong thing to begin with, and then next we have to look at the advertisements, the circulars, and the almanack. [His Lordship then commented on the similarity of the packages of the Defendants in colour and size to those of the Plaintiffs—on the fact that the almanack contained Dr. *Hassall's* report and statements as to prizes awarded, &c., all of which related to the food manufactured by *Joseph Thorley*—as tending to lead the public to believe that in dealing with the company they were dealing with the original manufacturer. His Lordship then reviewed the parol evidence as to the statements made by the Defendants' travellers, and stated his conclusion to be that the travellers, though instructed not to say anything that was positively untrue, took care to express themselves in such a way as to induce a belief that the company were carrying on *Joseph Thorley's* manufacture.]

I am, therefore, of opinion that in this case what the Defendant company have done has been calculated to deceive, and I am bound to say, in my judgment, I have no doubt was from the first intended to deceive the persons purchasing their article into the belief that they were purchasing the article which *Joseph Thorley* had formerly manufactured at the works which had attained the

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great reputation which *Thorley's* manufacture appears to have obtained. I am of opinion that the order should have been granted in the general words in which it was asked.

BAGGALLAY, L.J.:—

The question for determination is this: Have the company in offering for sale the article manufactured by them made representations which were calculated to induce a reasonable belief on the part of those to whom the offers were made that the article was manufactured by the successors in business of *Joseph Thorley?* In my opinion that question must be answered in the affirmative; and being so answered, it appears to me that an injunction ought to issue substantially in the form in which it is asked in the writ.

The circumstances under which the manufacture was commenced by the company in the year 1877 cannot be disregarded. Down to that period the manufacture of the article known as "*Thorley's Food for Cattle*" had been carried on for twenty years, first of all by *Joseph Thorley*, and after his death by his executors. He had acquired the recipe from a person of the name of *Fawcett*. No doubt after a time when *Fawcett* had fully instructed him in the manufacture of the article his brother *Josiah* was taken into his employment, and whilst in that employment acquired a knowledge of the way of compounding this condiment. But he left this employment ten years before *Joseph's* death, and then this business having been confined to *Joseph Thorley* and his executors for the long period of time I have mentioned we have this company formed within ten months after *Joseph Thorley's* death, under circumstances which are very suggestive of an endeavour to get the benefit of the reputation acquired by *Joseph Thorley* in the manufacture of this article. We have a company formed and called *J. W. Thorley's Cattle Food Company, Limited.* The only excuse for having the name *J. W. Thorley* introduced into the description of the company is this, that he took a share to the extent of 1s., and was then employed by the company as the manager of their business. I say this company was started under circumstances of a very suspicious character. We have had a good deal of argument as to the right to use the name "*Thorley's Food for Cattle,*" and much dis-

cussion whether any person at the present time can use that name except the executors of *Joseph Thorley*. I think the passage which the Lord Justice *James* has referred to in the judgment of Lord Justice *Turner*, in the case of *Burgess* v. *Burgess* (1), indicates very clearly what the rights are under similar circumstances. I do not profess to say now whether *J. W. Thorley*, if honestly carrying on a business on his own account in the manufacture and sale of this article might not call it by the name of "*Thorley's Food for Cattle*," provided he took proper precautions to prevent it being supposed that the article he was so manufacturing was manufactured by the representatives of *Joseph Thorley*, but I feel satisfied that the company has no right whatever to use that name. I am strongly inclined to the opinion, though it is unnecessary to decide that, according to the view of Lord *Westbury* in the "*Glenfield Starch*" case, the expression "*Thorley's Food for Cattle*" indicates the trade denomination of the article manufactured by the particular person; but even on the assumption that the Defendant company had not only the right to manufacture this article but to call it "*Thorley's Food for Cattle*," I have come to the conclusion on the evidence that they adopted such a mode of endeavouring to push that article in the market as to induce many persons to entertain the reasonable belief that the article they were so putting upon the market had been manufactured by the representatives of *Joseph Thorley*. [His Lordship then entered on a consideration of the similarity of the packages, the issuing of the almanack, and the evidence as to the statements made by the travellers.] I am satisfied on the whole transaction from beginning to end that the object was to obtain as far as possible a slice of the large business previously carried on by *Joseph Thorley* and by his executors, and to obtain that by making representations which the principles of this Court will not allow to be made.

BRAMWELL, L.J.:—

The complaint of the Plaintiffs is not that the Defendants made and sold the same article that the Plaintiffs make, but that it was sold in such a way as to induce purchasers to believe that it was

(1) 3 D. M. & G. 896.

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the article manufactured by the establishment which was *Joseph Thorley's*, and now is carried on by his executors. The learned counsel for the Defendants admit that if that is so there is a cause of action against them, and that they must be restrained from doing it. The question therefore is one of fact, was the trade so carried on by the Defendants as to give rise to that belief? It appears to me almost impossible to entertain a doubt upon that question. I confess that as soon as I saw the packages of the Plaintiffs and the Defendants I thought that there was an end of the case. It is all very well to say, If you examine them you will find a difference between them. No doubt so you will between a Bank of *England* note and a Bank of Elegance note, but people who passed a Bank of Elegance note have got into trouble for obtaining money under false pretences, although they never could be convicted of forgery. It is impossible to suppose that the Defendants did not adopt the same form of package as the Plaintiffs with an intention to mislead. If not, the Defendants ought to be very much obliged to those who have pointed out to them that they are doing that which they do not intend to do, but which there is no doubt they are doing, that is to say, misleading the public.

I wish to make one observation about the use of the name "*Thorley's Food for Cattle.*" It has been said that the Defendants have a right to say they make *Thorley's Food for Cattle* if they do not deceive. I agree that if they could use that expression without the risk of deceiving they ought to have a right to do so, but it seems to me almost impossible that they can. It is urged that it is hard upon them to forbid their using it, for that every *Thorley* has a right to make food, and therefore to sell it in his own name, and consequently, I suppose, to call it *Thorley's Food.* But not only has every *Thorley* a right to do that, but every *John Doe* has a right to do that because he may give himself the name of *Thorley* and carry on business under that name if he thinks fit. A surname is not a man's legal property, or conferred upon him by law in any particular way, it is gained by reputation, and if he choose to adopt the name of *Thorley*, and other people call him by that name, he is *Thorley* to all intents and purposes, although his name was originally *John Doe.* Then it is said that it is hard if

a man has the name of *Thorley* that he cannot make food and sell it as *Thorley's Food*. So he may, but if, unfortunately for him, some preceding *Thorley* has carried on the business of making cattle food in such a way that by the name "*Thorley's Cattle Food*" is understood the manufacture of that man, then the second *Thorley*, or the man who assumes his name, must take care so to conduct his business as not to be mistaken for the original *Thorley*, and if he carries on his business so as to be mistaken he must be restrained from doing it. It is not a hardship upon him that he should be obliged to state in his advertisements that the article produced by him is the same as *Joseph Thorley* produced, and is the article which he called "*Thorley's Food for Cattle*," and that the public may buy it of him as well as of the representatives of the original *Thorley*. The Defendants in that sense might use the words "*Thorley's Food for Cattle*," but if they cannot use that expression without misleading people they must not use it because it tends to the detriment of the Plaintiffs.

I should like to make one remark as to the way in which this new business arose. I suppose that on the death of the original *Thorley* the promoters of the company thought that there was no one who had any particular right to use the name of "*Thorley's Food for Cattle*" any more than anybody else, and that consequently anybody with the name of *Thorley*, and possibly without that name, could make and sell this article and call it "*Thorley's Food for Cattle*." They therefore got hold of *Thorley* who had the good fortune to have that name and to know the secret, and so they began this business. Now let us suppose, for instance, that *Bass's* firm consisted of *Bass, Gretton, & Ratcliff*, trading under the firm of *Bass & Company*, it would be admitted that as long as *Bass* continued one of the firm no one would have a right to brew ale and sell it under the name of *Bass's Pale Ale* unless he took care that it was not confounded with that well-known beer or ale which is produced by the firm which I suppose to consist of *Bass, Gretton, & Ratcliff*. Suppose then that Mr. *Bass* retired and *Gretton* and *Ratcliff* carried on the business under the same name as before, that is to say, *Bass & Company*, could it be supposed for a moment that because Mr. *Bass* had left the firm people then would have a right to say, Oh, there is no longer a *Bass* who makes *Bass's Pale*

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Ale, therefore we will call ourselves makers of *Bass's Pale Ale?* It seems to me manifest there would be no right to do so. *Bass's Pale Ale* has acquired, as *Thorley's Cattle Food* has here, a sort of name, and is known as the production of a certain establishment, and the use of that name is a right (a property, I suppose, one can hardly call it) in the proprietor of the establishment, and no one else has the right to so act that people dealing with him may think they are dealing with the original establishment. If, after *Thorley's* death, his executors had not continued his business and some time had elapsed before anybody had started the manufacture of this food, then the words "*Thorley's Cattle Food*" might have become common property, just in the same way as *Liebig's Extract of Meat;* but that not being the case, it seems to me the Defendants have done, and I must say I think wilfully done, what is to be regretted, and what they must be restrained from doing, that is to say, endeavoured to make a profit at the expense of the Plaintiffs by producing an article and selling it in such a way as to cause the public to believe that they are buying the article manufactured by the Plaintiffs.

JAMES, L.J.:—

An injunction will be granted to restrain the Defendant company, their servants, workmen, agents and travellers, and representatives respectively, from selling, exporting, or shipping, or causing, or procuring, or allowing to be sold, shipped, or exported, and from in any manner representing, or causing, or procuring to be represented, any goods manufactured by the Defendant company as the manufacture or goods of the late *Joseph Thorley*, or of the Plaintiffs his trustees and successors in business; and also from in any manner representing, or causing or procuring to be represented, or doing anything which shall lead to the belief, that the Defendant company have been or are carrying on the business of the late *Joseph Thorley*, or are the successors in business of the late *Joseph Thorley;* and also from affixing or permitting or causing to be affixed to any goods or articles manufactured or bought or procured or sold or shipped or exported by the Defendant company, or otherwise using or employing, or permitting to be used or employed, any labels, wrappers, or marks used by the late

Joseph Thorley and the Plaintiffs, his trustees and successors in business, or so contrived and prepared as to represent or lead to the belief that the goods or articles manufactured or sold or shipped or exported by the Defendant company are the goods or manufacture of the late *Joseph Thorley* or of the Plaintiffs; and also from employing, using, or circulating, or causing to be employed, used, or circulated, any circulars, pamphlets, notices, or advertisements of the late *Joseph Thorley* or of the Plaintiffs, or which shall in any manner represent or lead to the belief that the Defendant company have been or are carrying on the business of the late *Joseph Thorley*, or that they are his successors in business.

Mr. *Glasse*:—But is it not the substance of your Lordships' judgment that they are not to use the word *Thorley* in connection with their cattle food?

JAMES, L.J.:—We cannot prohibit their using the name if they use it in a way not calculated to mislead the public.

Solicitors: *Collyer-Bristow, Withers, & Russell; W. Eley.*

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C. A. 1879 V.-C. M. *Feb.* 11, 12, 17; *Nov.* 11, 12, 20. C. A. 1880 *April* 16, 26, 27.

[1877 T. 112.]

Injunction—Libel Injurious to Trade.

Joseph Thorley died in 1876, having for years carried on the manufacture of a condiment well known as "*Thorley's Food for Cattle.*" His executors continued his business. In 1877 a company was formed for manufacturing the same article, and employed a brother of *Joseph Thorley* who was acquainted with the secret of the manufacture. The executors published in the newspapers an advertisement warning the public that any food purporting to be *Thorley's* food for cattle, and not signed "*Joseph Thorley*," was not the manufacture of the establishment carrying on business as *Joseph Thorley*, the proprietors of which were alone possessed of the secret for compounding the food. The executors also issued a circular to their customers warning them against the course pursued by the company "in seeking to foist upon the public an article which they pretend is the same as that manufactured

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by the late *Joseph Thorley*." The Court came to the conclusion that there was no substantial difference between the food sold by the executors and that sold by the company :—

Held, by *Malins*, V.C., and by the Court of Appeal, that the advertisement and circular contained untrue representations calculated to injure the company in their trade, and that the issuing of them ought to be restrained by injunction.

Pat 868,572
15 Ch D 26
32,40
19 Ch D 387
20 Ch D 506
S 11

THIS was an action by *J. W. Thorley's Cattle Food Company* against the executors of the late *Joseph Thorley*, who had for many years before his death carried on the manufacture and sale of a compound known as "*Thorley's Food for Cattle*," for an injunction to restrain the Defendants from advertising or representing in their advertisements or circulars that they were alone possessed of the secret for compounding the condiment known as "*Thorley's Food for Cattle*," and from representing that the cattle food manufactured and sold by the Plaintiffs was spurious, or not genuine, or not compounded in accordance with the true recipe, of the same ingredients, and in the same proportions, and in the same manner as the condiment known as "*Thorleys Food for Cattle*," manufactured and sold by *Joseph Thorley* in his lifetime.

Joseph Thorley died in November, 1876, and his executors continued his business. In March, 1877, the company was formed for the purpose of manufacturing and selling the same article, and *J. W. Thorley*, a brother of *Joseph Thorley*, who had been employed in *Joseph Thorley's* business and was acquainted with the process, was employed by the company to conduct the manufacture.

Shortly after the formation of the company the executors of *Joseph Thorley* commenced an action against the company to restrain them from using the name of "*Thorley's Food for Cattle*," and from selling as "*Thorley's Food for Cattle*" food not manufactured by the executors. A motion for an injunction was heard by Vice-Chancellor *Malins* on the 14th of June, 1877, and was refused, his Lordship being of opinion that the food sold by the company was shewn by the evidence to be the same food as that manufactured by the executors, and that the company had a right to sell it as they did (1).

The executors thereupon discontinued their action, and in the

(1) 6 Ch. D. 574.

same month published in various newspapers the following advertisement:—

"CAUTION.—*Thorley's Food for Cattle.*

"The public, and in particular farmers, graziers, dealers, and others purchasing this world-famed food, are warned that any food for cattle purporting to be '*Thorley's Food for Cattle*,' and not signed with the name '*Joseph Thorley*,' is not the manufacture of this establishment, carrying on business as *Joseph Thorley*, the proprietors of which are alone possessed of the secret for compounding that famous condiment, and carry on business at *Pembroke Wharf, Caledonian Road.*"

The executors also distributed among their customers a circular which was in part as follows:—

"In sending you our circular as to the efficacy of the well known '*Cattle Food*' manufactured by the late Mr. *Joseph Thorley* for twenty years past, and which has attained such world-wide notoriety as the best cattle food ever offered to the public, we think it well to warn you against the course pursued by a company which has lately been registered with a nominal capital of only £200 and a paid-up capital of a few shillings, in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late *Joseph Thorley.*"

The company thereupon commenced the present action. The case first came on upon motion for an injunction on the 30th of June, 1877 (1), and Vice-Chancellor *Malins* expressed a strong opinion that the executors were not justified in issuing the above advertisement, but declined to grant an injunction upon an interlocutory application.

After the hearing of the motion the statement of claim was filed which contained an allegation that the advertisement and circular had caused damage to the trade of the company by preventing customers and proposed customers from purchasing the food manufactured by them, and the action now came on for trial. Evidence was adduced by the Plaintiffs that in consequence of the advertisements and circulars many customers of the company

(1) Reported 6 Ch. D. 582.

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had returned packages of the cattle food which had been ordered by them, and others had refused to deal with them on the ground that the cattle food supplied by the Plaintiffs was not the genuine condiment as formerly manufactured by the late *Joseph Thorley*. There was also much evidence given by scientific witnesses to prove on behalf of the Plaintiffs that the cattle food manufactured and sold by them was precisely the same as that which was made by the Defendants; and by other scientific witnesses to prove on behalf of the Defendants that there was a considerable difference between the two condiments, the object of the Defendants being to shew that the Plaintiffs could not consequently be acquainted with the secret for compounding the genuine cattle food as sold by the late *Joseph Thorley*. Both the Vice-Chancellor and the Court of Appeal came to the conclusion that the articles manufactured by the executors and by the company were substantially the same.

The action came on for trial before Vice-Chancellor *Malins* on the 11th of February, 1880.

Higgins, Q.C., and *Townsend*, for the Plaintiffs:—

Upon the motion for an injunction your Lordship expressed your opinion that the advertisement now complained of was untrue, and calculated to injure the trade of the Defendants. We submit that special damage (if that is necessary) has been fully proved by our witnesses. We have now brought the case clearly within the authorities where the Court has restrained the publication of advertisements and circulars calculated to cause, and which have caused, injury to trade. The Court has granted injunctions upon much weaker grounds than we have here. An injunction was granted to restrain the publication of a book which was alleged to have been written by a person who denied the authorship: *Lord Byron* v. *Johnston* (1); and in *Routh* v. *Webster* (2) the Master of the Rolls restrained the Defendants from advertising the Plaintiff's name as a provisional director of a company without his authority, on the ground that it might subject him to responsibility. It is true that in *Clark* v. *Freeman* (3) an injunc-

(1) 2 Mer. 29. (2) 10 Beav. 561.
(3) 11 Beav. 112.

tion was refused to restrain the use of a person's name as the author of a medicine, but there was no proof of money damage; and Lord *Cairns*, in *Maxwell* v. *Hogg* (1), said that he had always thought the case of *Clark* v. *Freeman* (2) might have been decided differently.

It was held in the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (3) that to print and publish of a tradesman, falsely and without lawful occasion, that the goods sold by him were inferior in quality to similar goods sold by his rival, was actionable if special damage resulted, and similar decisions were given in *Young* v. *Macrae* (4) and *Riding* v. *Smith* (5); and also in *Tabart* v. *Tipper* (6) it was held that to tax a bookseller falsely with having published an absurd poem was actionable, if the evident tendency was to injure the bookseller in his business. The utmost that can be requisite to bring this case within these authorities is to shew special damage, and that we have done; and *Saxby* v. *Easterbrook* (7) is an authority that a verdict that a published statement is libellous may now be given by the Judge who tries the action. We further submit that, supposing no special damage proved, still it is evident that the statements made by the Defendants are calculated to injure the Plaintiffs' trade, and therefore, upon the decision in *Hookham* v. *Pottage* (8), the Court will restrain a continuance of the injury. In *Hinrichs* v. *Berndes* (before the M.R. Jan. 18, 1878) the Master of the Rolls observed that he was not prepared to say that if, under the *Judicature Act*, a plaintiff could sustain an action for libel, this Court would not at the hearing award damages for the libel and restrain the continuance of its publication. We ask for damages, and for an injunction in the terms of the claim.

[They also cited *Folkard* on Slander (9).]

Glasse, Q.C., and *Nalder*, for the Defendants:—

Since this case was last before the Court we have discovered that the cattle food made by the Plaintiffs is not the same as

(1) Law Rep. 2 Ch. 307.
(2) 11 Beav. 112.
(3) Law Rep. 9 Ex. 218.
(4) 3 B. & S. 264.
(5) 1 Ex. D. 91.
(6) 1 Camp. 350.
(7) 3 C. P. D. 339.
(8) Law Rep. 8 Ch. 91.
(9) Page 167.

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that which we compound from the original recipe. It is also proved that we have improved upon the original receipt by the addition of more of the expensive ingredients. Under these circumstances we are justified in advertising that we are alone possessed of the secret for compounding the original condiment, and that the Plaintiffs' cattle food is not the genuine article as manufactured by the late *Joseph Thorley*.

Then as to the jurisdiction of the Court, the cases cited do not shew that there is any power in a case like this to grant an injunction. No special damage has been shewn. The evidence as to damage is of the most vague description, and the Plaintiffs have gone on increasing their trade notwithstanding our advertisements. We are carrying on the original business of *Joseph Thorley*, and the Plaintiffs are using our name and issuing advertisements quite as much calculated to injure our trade as ours could possibly be to injure theirs, and we have been driven to make public the true state of facts. The case of *Prudential Assurance Company* v. *Knott* (1) is distinctly in our favour, since it was there held that the Court has no jurisdiction to restrain the publication of a libel even if it is injurious to property; and in that case the opinion of the Court of Appeal was adverse to the decisions in *Dixon* v. *Holden* (2) and *Springhead Spinning Company* v. *Riley* (3). So in *Saxby* v. *Easterbrook* (4) it was laid down by Lord *Coleridge* that the question of libel or no libel was one peculiarly for a jury, and the Court would not interfere by injunction until the publication was found by a jury to be libellous; and Mr. Justice *Lindley* gave his opinion to the same effect. In all the other cases cited there was injury distinctly proved. This case must have been launched on the decision in *James* v. *James* (5), but there it was said that a man who sold an article compounded from a secret which he had discovered must not do anything to lead the public to suppose that his preparation was the manufacture of the successors in business of the original discoverer. These Plaintiffs have been doing what they could to induce the public to believe that they are carrying on the business of *Joseph Thorley*, and we were bound in self-

(1) Law Rep. 10 Ch. 142.
(2) Ibid. 7 Eq. 488.
(3) Law Rep. 6 Eq. 551.
(4) 3 C. P. D. 339.
(5) Law Rep. 13 Eq. 421.

defence to make the statements we have made. But our advertisement is not libellous. It is not a libel upon the Plaintiffs, even if it is not true, to say that we are the only possessors of the secret. Any man may say, "I alone know how to make the article." It may be untrue, just as half the advertisements are which we daily read, but it is not a libel.

Higgins, in reply, cited *Evans* v. *Harries* (1), where, in an action for slander for words spoken of the Plaintiff in his trade or business, with a general allegation of loss of business, it was held to be competent to the Plaintiff to prove, and the jury to assess, damages for a general loss or decrease of trade, although the declaration alleged the loss of particular customers as special damage which was not proved.

MALINS, V.C.:—

The object of this action is to restrain the Defendants, that is, the executors of the late *Joseph Thorley*, from issuing any advertisement in which it is stated "that they are alone possessed of the secret for compounding that famous condiment," namely, *Thorley's Cattle Food*. The circumstances of this action were before the Court at great length in June, 1877, and my judgment on the motion then made is reported (2). The facts then proved were that the secret, whatever it was, was communicated by a person named *Fawcett* to the late *Joseph Thorley* and to his brother *Josiah*. *Joseph Thorley* made a payment to *Fawcett* of £4 a ton on all the food that was sold. *Josiah Thorley*, the brother of *Joseph*, was in his employment for twenty-two years, in one capacity or another; and from 1857, when *Joseph* began to make his cattle food, *Josiah* was his managing man till 1868, a period of eleven years, and *Josiah* knew all about the production of this cattle food just as well as his brother *Joseph* himself. I have already decided that both brothers had an equal knowledge respecting the production of this article. In 1868 some difference arose between the two brothers and *Josiah* left *Joseph*, and nothing can be more clear to my mind than that *Josiah* might, the very day after they separated, have set up business in opposition to his

(1) 1 H. & N. 251. (2) 6 Ch. D. 582.

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brother, and might have sold this food made from the same recipe under the same name—"*Thorley's Cattle Food*"—and it would have been impossible for *Joseph* to have prevented his doing so. Some time after the separation of the two brothers they became reconciled, and lived together again on terms of friendship, so much so, that in 1873, *Joseph*, in making his will—that is, five years after the quarrel—appointed *Josiah* one of his executors, though for some reason that appointment was revoked by a codicil. Now the state of things existing at the death of *Joseph* was this: The business was in full vigour. The executors had all the rights which he had. They had the right to sell the food, and they continued the business, and certainly any person of the name of *Thorley* was entitled to make the same food, if he had the same means of doing so, and to call it "*Thorley's Cattle Food*"; but *Josiah*, it seems, had no capital, and he was obliged to apply to other people, and they formed a company, the capital of which was £200 in 4000 shares of 1*s.* each. I think it is to be regretted that the law has not provided what is the minimum amount of capital a company may have, or the minimum amount of the shares, but I am not aware of anything to prevent the capital being 4000 shillings or 4000 farthings. Suppose *Josiah Thorley* had commenced business on his own account with a capital of £200 only. Many men have begun business with less who have achieved great success—could it be an objection to him that he began with so small a capital if he did nothing to violate the law? It is clear to my mind that no objection can be raised to a company because it consists of a small amount of capital or a small number of shares, provided the law is complied with. The first application made to me was an action by the present Defendants to prevent *Josiah Thorley* and the company from selling the food under the denomination of "*Thorley's Cattle Food.*" I then decided, and my decision is reported (1), that any person who had become acquainted with the process of manufacturing an article which is in general request is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person manufacturing it afterwards is entitled to describe it by the name of such original manufacturer, and if he

(1) 6 Ch. D. 574.

happens to be of the same name, he may use his own name in describing his business or allow it to be used by a company formed by himself for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name. The result of that action was that after I had refused the motion on behalf of the executors of *Joseph Thorley* to restrain *Thorley's Cattle Food Company* from using the name, the Plaintiffs dismissed their action with costs, shewing that they acquiesced in my decision that *Josiah* was entitled to sell the food he was selling, and was entitled to do all that he was then doing. But having taken that course, it appears that the executors of *Joseph Thorley*, twelve days afterwards, issued the advertisements which are complained of.

The first part of the advertisement, although it is of the usual boasting character, would not have been objected to, but what the Plaintiffs object to are these words, "The proprietors of which are alone possessed of the secret for compounding that famous condiment." Now, considering that the Court had decided on the 14th of June that the article produced by *Josiah Thorley* was precisely the same as that produced by *Joseph Thorley* himself and afterwards by his executors, and that *Josiah Thorley* was entitled to sell his food under this name, I cannot see how the executors could with propriety issue this advertisement. *Thorley's Cattle Food Company* felt that this was very injurious, and likely to be injurious to them, and therefore they moved before me on the 30th of June for an injunction, the result of which motion is reported in the same volume (1). I then went very fully into the matter, and though I was very clear that the advertisement was wholly objectionable and unjustifiable, yet, inasmuch as there was a great conflict of authority as to the power of the Court to grant an injunction to prevent the publication of a libel, I thought it better that the case should be decided at the hearing of the action, and I simply refused the motion upon that technical ground, and I certainly hoped that the strong opinion I then expressed would have led to a stoppage of the advertisement. I find, however, that although the Defendants have abstained from issuing that

(1) 6 Ch. D. 582.

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advertisement since the 30th of June, 1877, they still claim the right to do so, and if I do not now interfere against them there is no doubt whatever that the advertisement will continue to be issued, because it is proved that between the 14th and the 30th of June hundreds of advertisements were issued in every *London* and, I may say, almost every country newspaper in the terms I have just read.

Now, if I was right in my judgment on the 30th of June, they certainly are not entitled to issue that advertisement, because they are not alone possessed of the secret; and I am as satisfied from the evidence which has been brought before me on this occasion as I was then that *Josiah* is just as much in possession of the secret as *Joseph* was or the executors can be, and therefore they are not entitled to state that they alone are in possession of the secret.

But in order to get rid of that difficulty a great body of evidence, including many scientific witnesses on both sides, has been brought before me, which has occupied about eight or nine days, in order to prove on the part of the Plaintiffs that there is no substantial difference between the food produced by the company and that produced by the executors; and on the part of the Defendants to prove that there is a difference, and that the food produced by the executors is superior to that of the company, and that it could not have been made from the same recipe. Mr. *Glasse* seemed very much to rest his case for the Defendants upon an improvement since the death of *Joseph Thorley*, but the cattle food as made by *Joseph Thorley* during his life is the food which the executors are now professing to sell without any variation, and they do not put their case upon any improvement which has been made in it.

[His Lordship then commented upon the scientific evidence adduced, and said that in his opinion none of the witnesses had proved any substantial difference to exist between the cattle food made by the Plaintiffs and that made by the Defendants, and continued:—]

Now, therefore, coming, as I do, without the slightest doubt, to the opinion that the food as made by the company is identical with the food made by *Joseph's* executors, there is no justification for their asserting that theirs is different from the company's

food. Therefore the question I have to decide is, whether they were justified in issuing the advertisement, and, having issued it, whether they can be allowed to continue it.

Now, that they were not justified in issuing it, is, I think, abundantly clear from the opinion I expressed in 1877. "The proprietors of which are alone possessed of the secret for compounding that famous condiment" is an untrue statement, and an untrue statement ought not to be made for the purpose of pushing a trade.

Then comes the question which has been so much argued, whether the Court can interfere. Now, I do not intend to say anything more upon the question of the propriety or power of this Court to interfere to prevent the publication of a libel injurious to character, and therefore, being injurious to character, also injurious to the property of an individual. Upon that subject I have fully expressed my opinion in my judgment of the 30th of June last year. I refer to that report, and to all that I then said I adhere. It is not necessary upon the present occasion for me to go further into that subject, because what I have now to decide is whether one man is entitled to publish an advertisement or make a statement injurious to the business of another.

First, then, is this a statement calculated to injure the business of the Plaintiffs? The world at large may be inclined to buy either the Defendants' or the Plaintiffs' condiment; probably if they could be satisfied that they are equal in quality they would be influenced either by personal favour or by the price. But if the Defendants in this case are at liberty to say that they alone are possessed of the secret, the effect is to tell the public: there is only one place in the world at which *Thorley's Cattle Food* can be obtained, and if you go to any other place you will not get the genuine thing, but a spurious article. That is calculated to attract all the public to buy the Defendants' food, and to prevent them from buying the Plaintiffs'. In my opinion such a statement is directly calculated to injure the business of the Plaintiffs.

I am told, however, that there is no evidence of injury, but in fact I have positive evidence of injury, because it is proved by Mr. *Eley*, one of the directors of the company, that goods have been returned to them in consequence of that advertisement,

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because the purchasers were led to believe that it was not a genuine article.

But I do not think that kind of evidence is necessary, because if the Court sees clearly that the advertisement in itself is calculated to injure, that is, in my opinion, quite sufficient, without any positive evidence that injury has been sustained. I acted on that principle in the case of *Hookham* v. *Pottage* (1), where the name was painted over a shop so as to lead the public, going into the shop, to believe that they were going into *Hookham's* shop, when in fact they were going into that of *Pottage*. I said there it was not necessary to prove any injury if the Court saw plainly that what was done was calculated to injure. My decision in that case was affirmed by the Court of Appeal, and for the same reasons, because Lord Justice *James*, in giving judgment, said he entirely concurred with the Vice-Chancellor. I therefore consider it clear that it is not necessary in these cases to prove actual injury where the Court sees that the advertisement or publication is of itself calculated to injure.

Therefore, I am clearly of opinion that the assertion that there is but one place at which this article can be obtained genuine, is calculated to injure the business of the Plaintiff.

Then how stand the authorities on this subject? It is now, I apprehend, settled that you may not issue an advertisement calculated to injure a person in his business. One of the last cases cited was that of *Riding* v. *Smith* (2). The action was brought—the ground of the defamation, or whatver it may be called—was that the defendant issued or made a certain statement with regard to the plaintiff's business which was calculated to injure him. That action was brought by the plaintiff, who was a grocer and draper, and was assisted by his wife in the conduct of his business, and he charged "that the defendant falsely and maliciously published of the plaintiff's wife, in relation to the business and her conduct as such assistant in the same, certain words imputing to her the commission of adultery with one *Joseph Abbott* upon the premises where the plaintiff resided and carried on business, whereby the plaintiff was injured in his credit, and certain persons named and many others who had dealt with him, ceased

(1) Law Rep. 8 Ch. 91. (2) 1 Ex. D. 91.

to do so. At the trial it was proved that the words complained of were uttered in the presence of three or more persons. The person to whom they were addressed was on her way to the church of the district, where *Joseph Abbott*, who had been appointed to the incumbency, was about to read himself in. No evidence was given that any of the persons who heard the statement of the defendant had ceased to deal with the plaintiff, but there was evidence of a falling off in the profits of the business since the publication of the words complained of, and the plaintiff was unable to account for this falling off except as the consequence of the statements. A verdict was found for the plaintiff for 40*s*." And then the question was, whether the verdict should not be set aside. In giving judgment, the Lord Chief Baron *Kelly* said: "The two questions are, first, whether such an action is maintainable at all, and, secondly, whether it can be maintained without proof of something of the same kind as the special damage that would have to be proved in an action for slander. It appears to me, as to the first point, that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business, and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander, or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff. Here the statement was that the wife of the plaintiff was guilty of adultery, and it is the natural consequence of such a statement that persons should cease to resort to the shop. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner. Then the question is, whether such a statement would be actionable

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without proof of special damage. That was requisite in the cases of slander which have been cited, but it does not follow that it is necessarily so in such an action as the present. The cases shew that in an action in respect of a statement made as to the wife or assistant of the plaintiff the words would not be actionable as slander without proof of special damage, which must be established not merely by general evidence that the business has fallen off, but by shewing that particular persons have ceased to deal with the plaintiff. I hope the day will come when the principle of *Ward* v. *Weeks* (1) and that class of cases shall be brought under the consideration of the Court of last resort, for the purpose of determining whether a man who utters a slander in the presence of others is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part."

No doubt Mr. *Glasse*, in reply to that case, said the difference between that case and the present is that damage had been sustained. There is not that difference, because I have positive evidence here that damage has been sustained by the Plaintiffs in consequence of the course adopted by the Defendants.

Then there is the case of *Saxby* v. *Easterbrook* (2). The head-note is, "The Court has power to issue an injunction to restrain the defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury have found to be libellous.—*Semble*, that this power may be exercised by the Judge who tries the cause." At the trial before Lord *Coleridge*, C.J., it appeared that the defendants carried on business in partnership as engineers and railway signal manufacturers, and that some rivalry existed between them and the plaintiff, who carried on a similar business, and that the libels complained of were published by the defendant *Hannaford*. The defendant *Easterbrook*, who disclaimed all knowledge, was discharged. The jury found that the publications in question were libellous, and a verdict was taken against *Hannaford* for 40*s*., with costs, and the learned Judge ordered that a perpetual injunction should issue to restrain him from publishing libels of the nature complained of against the plaintiff. A doubt, however, having been

(1) 7 Bing. 211. (2) 3 C. P. D. 339.

suggested as to the power of the Judge at *Nisi Prius* to order an injunction to issue, Mr. *Aston* moved "That a writ of perpetual injunction do issue to restrain the defendant." I see that my judgment in this very case of *Thorley's Cattle Food Company* v. *Massam* (1) was commented upon by the learned counsel and also by the Court, and Lord *Coleridge* says this (2): "I am of opinion that Mr. *Aston* is entitled to the order which he prays. This is an action for a libel, in which the plaintiff claims damages and an injunction to restrain the defendants from publishing libels against the plaintiff, and repetitions of acts of the like nature and description as those described in the statement of claim, to the injury of his business. An order to that effect was made by me at the trial. But, inasmuch as it seemed to be doubtful whether upon the cases in Equity such an injunction could be granted for the purpose of restraining the publication of a libel, it has been judged right to make the application to the Court."

Lord *Coleridge* then says: "Such cases there are, and they seem to me to have proceeded upon a perfectly good ground, but one which is distinguishable in principle from the case now before us. Libel or no libel, since *Fox's Act*, is of all questions peculiarly one for a jury; and I can well understand a Court of Equity declining to interfere to restrain the publication of that which has not been found by a jury to be libellous. Here, however, the jury have found the matter complained of to be libellous, and it is connected with the property of the plaintiff, and calculated to do material injury to it. It is that which is sought to be restrained; and upon principle it appears to me to be a proper thing to do. My Brother *Lindley*, who is more conversant with these matters than I am, informs me that all the cases where the Courts of Equity have refused to interfere were cases where the application was made before verdict. Here the jury have found the publications to be libellous and they are eminently calculated to injure the plaintiff's property in the patent rights which are assailed. I am unable to see any reason why the injunction prayed should not be granted: certainly the cases cited do not supply that reason. If the cases do not help us, they are not

(1) 6 Ch. D. 582. (2) 3 C. P. D. 342.

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in the way. All but one of them seemed to have been confined to interlocutory orders, and in that one it was sought to restrain the continuance of waste or trespass. As to sub-sect. 8 of sect. 25 of the *Judicature Act* of 1873, I must confess I do not appreciate its application to the matter." Mr. Justice *Lindley* says: "I am of the same opinion. I am not aware of any case in Equity which is precisely in point. The principle upon which the Courts of Equity have acted in declining to restrain the publication of matter alleged to be libellous is, that the question of libel or no libel is pre-eminently for a jury. But when a jury have found the matter complained of to be libellous and that it affects property, I see no principle by which the Court ought to be precluded from saying that the repetition of the libel shall be restrained. The only reason I can suggest for not granting it clearly does not exist here: and I think it would be much to be regretted if we felt ourselves compelled to refuse the order. It is, however, hardly a case for costs." Therefore, it being decided that it is calculated to injure the plaintiff, he gets an injunction to prevent a repetition of the injury.

There is the case also of the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1). The defendants falsely and without lawful occasion published a statement disparaging the quality of the plaintiff's goods, and special damages resulted from the publication. In the case now before me the disparaging of the quality of the Plaintiffs' goods is perfectly clear, because if there is only one place where a genuine thing can be had, all other things must be spurious, and therefore it is just as much as if they said that what the Plaintiffs sell is a spurious article. The statement set out a report from a chemical laboratory at *Glasgow* on various productions, and it gave the Plaintiffs' mixture as being of very inferior quality, which ought to be sold at the lowest price.

Mr. Baron *Bramwell*, in his judgment, says that so far an action would not be maintainable. "But what makes the action maintainable," says his Lordship, "is the allegation that follows: 'Whereas in truth and in fact the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior

(1) Law Rep. 9 Ex. 218.

quality, and were not inferior in quality to the said articles of manure of the defendants,' and by reason of the premises certain persons who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue, so far as it disparages it, and which has been productive of special damage to the plaintiffs;" and his Lordship further said: "It seems to me, however, where a plaintiff says, 'You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers,' an action is maintainable. . . . On the general principle, therefore, that an untrue statement disparaging a man's goods published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs."

I think these cases at law thoroughly establish this—I do not go into the general question of libel—but they have established this doctrine: that, where one man publishes that which is injurious to another in his trade or business, that publication is actionable, and, being actionable, will be stayed by injunction, because it is a wrong which ought not to be repeated.

Now I have only one other authority to refer to which shews that a Judge of this Court takes the same view. A similar point was brought before the Master of the Rolls; it does not seem to have gone on, and there is no final decision on the subject, and I refer to it only as shewing his opinion. There is a short note of the case in the *Weekly Notes* of 1878. It was a motion on behalf of the plaintiff, who was a vendor of cigars, to restrain the defendants from publishing in the *London Tobacco Trade Review* a circular which it was alleged that the defendants *Byles & Co.* were about to publish in that journal. So here it was not an actual injury done, but an apprehended injury, which the plaintiff considered would injure his trade. The indorsement on the writ claimed an injunction only, and not damages, and the Master of the Rolls ordered the motion to stand over to the hearing, and observed that he was not prepared to say that if,

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under the *Judicature Act*, a plaintiff could maintain an action for libel, this Court would not at the hearing, while awarding damages for the libel, restrain a continuance of the publication. It seems, therefore, that he dealt with it on the same principle—that if the publication which is about to take place may be, still more if one which has taken place is, injurious to the business of the plaintiff, that is a case for the interference of the Court, and an injunction will be granted.

Therefore, upon principle, I cannot entertain the least doubt that it is right and proper for this Court, where it sees that one trader is practising an unfair mode of trading, representing that his article is the only genuine one, from which it follows that all others are spurious, that that is so calculated to injure the business of another that this Court, seeing it is a wrong which ought not to be repeated, will prevent it by injunction.

From the authorities I have cited it is very clearly established that, where injury has been sustained, at all events it will grant an injunction; and, moreover, the case of *Riding* v. *Smith* (1) shews that, in the opinion of the Court of Exchequer, it is not necessary to prove damage if the thing is in itself calculated to be injurious. I am therefore of opinion, first of all on the evidence of Mr. *Eley*, that damage has been sustained, because they have had their goods returned in consequence of this advertisement; and, being of opinion that it is calculated to injure, if I were sitting as a jury it would be my duty to give a verdict for the Plaintiffs. Sitting, to a certain extent, as I do, as a jury, if it were necessary, I should find that the Plaintiff has sustained damage, and, if necessary, I should award damages to him. But for the purpose of my decision it is only necessary for me to come to that conclusion, and coming to the conclusion, as I do, first, that the materials produced by the Plaintiffs and the Defendants are identical as nearly as possible, the advertisement is, in my opinion, improper, and a perpetual injunction against its repetition must be granted.

Now, there is one other circumstance I ought to mention. I have said already that there is no evidence that any alteration in the mode of making the article took place after the death of

(1) 1 Ex. D. 91.

Joseph, or by *Joseph* himself after *Josiah* had left him. And I have said that, even if there had been some minute alterations, that would not have prevented the Plaintiff's right to make this food, the cattle food, and call it by *Joseph's* name. He is as much *Thorley* as his brother was, and therefore it is cattle food made by *Thorley*, and it is *Thorley's Cattle Food.* I will adopt the well-known sentence of Lord Justice *Knight Bruce* in the case of *Burgess's* sauce, where he says (1), "All the Queen's subjects have a right if they will to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them." So in this case, all mankind are entitled to make cattle food, and every man is entitled to call the cattle food he makes by his own name. *Josiah*, therefore, is entitled to make cattle food and call it "*Thorley's Cattle Food.*" He is also entitled to make it from the recipe he had from *Fawcett* as well as his brother; it is the same thing which he makes, for there is no evidence that it is different.

On all these grounds, therefore, I come to the conclusion that the Plaintiffs have established their right to the injunction which they ask. They must have that perpetual injunction, and the Defendants must pay the costs of the suit. The injunction will be to restrain the Defendants from "advertising or representing or suggesting in their advertisements or circulars that they, or such proprietors, are alone possessed of the said secret, and from representing or suggesting, or doing anything calculated to represent or suggest, that the cattle food manufactured and sold by the Plaintiffs is spurious or not genuine." I think it will be sufficient to stop at those words.

Higgins, Q.C., asked that his Lordship would award damages to the Plaintiffs, if only a nominal sum.

MALINS, V.C.:—For the purpose, if necessary, of bringing the case within the decisions, I, as a jury, assess your damages at 40*s.*, and upon that I grant the injunction, and the Plaintiffs will have the costs of the motion.

The Defendants appealed. The appeal came on to be heard C. A.

(1) 3 D. M. & G. 903.

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together with an appeal in *Massam* v. *Thorley's Cattle Food Company* (1), on the 16th of April, 1880, but it is thought more convenient to report them separately.

Glasse, Q.C., and *Nalder*, for the Appellants:—

Assuming that the company knew the manufacture of the food as it was made at the time when *J. W. Thorley* was working with his brother, we make the condiment with improvements subsequently made by *Joseph Thorley* which are unknown to the company. The allegation therefore in the advertisements that we only knew the secret is strictly true, but even if the circular is a libel on the title of the company the Court will not restrain it, but will leave the Plaintiffs to pursue their proper remedies. The case of *Prudential Assurance Company* v. *Knott* (2) is in our favour, and the cases since the *Judicature Act* support the view that the Court will not interfere till the matter has been tried by a jury: *Saxby* v. *Easterbrook* (3).

Higgins, Q.C., and *Townsend*, for the company, were not called upon.

JAMES, L.J.:—

I am of opinion that in the two documents, the advertisement and the circular, which throw light upon each other, the Defendants have said more than they ought to have said. They had a right to warn the public that the company were not carrying on the business which was carried on by the Defendants, and were not the successors of *Joseph Thorley*; but they did more than this—they went on to make allegations imputing to the company that they were foisting a fictitious article on the public. We think that the executors have not proved their justification of that libel. Having had our attention called to the evidence, we think that the executors have failed to prove that there was any foundation in point of fact for the assertion that the company were foisting on the public an article different in character from what they represented it to be.

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(1) *Ante*, p. 748. (2) Law Rep. 10 Ch. 142.
(3) 3 C. P. D. 339.

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BAGGALLAY, L.J.:—

This is an appeal from a decree of Vice-Chancellor *Malins* declaring that the Defendants were not entitled to advertise or represent that they or the proprietors of the establishment carrying on business as *Joseph Thorley* were alone possessed of the secret for compounding the condiment known as *Thorley's Food for Cattle*, and granting an injunction restraining the Defendants from advertising or representing in their advertisements or circulars that they or such proprietors were alone possessed of the secret, and from representing or suggesting or doing anything calculated to represent or suggest that the cattle food manufactured and sold by the Plaintiffs was spurious, or not genuine. I agree with the Lord Justice in thinking that the appeal should be dismissed. The company having been formed in March, 1877, the advertisements complained of were inserted in the newspapers, and the circulars issued in the latter part of the month of June in the same year. The advertisement was in fact in the form of a caution: "The public, and in particular all farmers, graziers, dealers, and others, purchasing this world-famed food are warned that any food for cattle purporting to be '*Thorley's Food for Cattle*' and not signed with the name of '*Joseph Thorley*,' is not the manufacture of the establishment carrying on the business as *Joseph Thorley*." Thus far no objection could be raised to it, but it goes on: "The proprietors of which are alone possessed of the secret for compounding that famous condiment, and carry on business at *Pembroke Wharf, Caledonian Road*." In the circular, which was the second subject of complaint, is contained a warning to the effect that the company were seeking to foist upon the public an article which they pretended to be the same as that manufactured by the late *Joseph Thorley*. I do not think that the Defendants were justified in issuing either of these documents. In my opinion they had no right to state that they were alone possessed of the secret, nor had they a right to say that the Plaintiffs in that action were seeking to foist upon the public an article which they pretended was the same as that manufactured by the late *Joseph Thorley*. It is unnecessary to go through the evidence in the case, but I feel bound to say that in my opinion the burden was on the Defendants to shew that there was a

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difference, and I think something more than a mere nominal difference, some substantial difference between the article made by the Plaintiffs and the article made by the Defendants. In my opinion, having very carefully gone through the several analyses in each case, there does not appear to be any substantial difference.

BRAMWELL, L.J.:—

Post 873, 4

I am of the same opinion, and have very little to add. I am satisfied that the two documents were libels. As to that one which uses the word "foist," it is needless to say anything, for it seems to be confessed on the part of the Defendants, the executors, that it is a libel. I had some misgiving about the other one, because I doubted at first whether it was anything more than that sort of commendation of their own wares which may be considered allowable, but when we think of the old way of declaring for libel or defamation, and consider this advertisement in connection with the surrounding circumstances, namely, that the Plaintiffs carried on the business of preparing food which they said they prepared according to a recipe which one *Joseph Thorley* had formerly used in his lifetime, it is manifest that this advertisement is a libel on the Plaintiffs in their trade. It begins: "Caution," and it says, "The public, and in particular farmers, &c., are warned that any food for cattle not signed with the name of *Joseph Thorley* is not the manufacture of the establishment carrying on the business of *Joseph Thorley*, the proprietors of which are alone possessed of the secret of compounding that famous condiment." I am satisfied that this was a libel on the Plaintiffs in the way of their trade, and calculated to do them injury, and consequently an action is maintainable with reference to the advertisement as well as with reference to the circular.

Solicitor for Plaintiffs: *W. Eley.*
Solicitors for Defendants: *Collyer-Bristow, Withers, & Russell.*

ROLLS *v.* VESTRY OF ST. GEORGE THE MARTYR, SOUTHWARK.

C. A.
1880
M. R.
Jan. 13.
C. A.
June 14.

[1879 R. 109.]

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 96—*Vestry—Streets to vest in—Stopped-up Street—Diverted Street.*

The Plaintiff having, with the sanction of the Metropolitan Board of Works, made a new street over his land within the Metropolitan District, upon which land were two old streets, *N. Street* and *A. Street*, an order was made at quarter sessions for stopping up part of *N. Street* as unnecessary, and an order was also made for diverting a part of *A. Street*, and opening the new street in lieu thereof. The vestry of the parish gave notice to the Plaintiff that he must not convert to his own use the stopped-up part of *N. Street*, nor stop up *A. Street*, or convert any part of the soil of it to his own use till he had purchased the same from the vestry :—

Held, by the Master of the Rolls, that the case was governed by *Coverdale* v. *Charlton* (1); and that, under 18 & 19 Vict. c. 120, s. 96, the surface of the streets and the soil to such a depth as was required for the purposes of a road was in the vestry, so that when the streets were stopped up or diverted they could sell them under sect. 154; and that the Plaintiff had no right to deal with the soil without purchasing it from the vestry.

Held, by the Court of Appeal, that under 18 & 19 Vict. c. 120, s. 96, all streets being for the time being highways are vested in the vestry, but only so long as they are highways, and that when they cease to be highways by being legally stopped up or diverted, the interest of the vestry determines :

Held, therefore, that the Plaintiff was entitled to convert to his own use the stopped-up part of *N. Street* and the diverted part of *A. Street*, subject, as to *A. Street*, to his first obtaining a certificate, under 5 & 6 Will. 4, c. 50, s. 91, that the substituted street had been completed and put into good condition and repair.

SPECIAL CASE.

The Plaintiff was tenant for life of certain estates, including a block of property about 260 yards long and 80 yards wide, bounded on the north-east side by the *Bricklayers' Arms* branch of the *South Eastern Railway*, and on the south-west by the *Old Kent Road*, which ran nearly parallel to each other, and at the north-west and south-east ends by *Hendre Road* and *Upper Grange Road*, and situate in the parish of *St. George the Martyr, Southwark*. This property was traversed by two streets, *Northampton Street*

(1) 4 Q. B. D. 104.

C. A. 1880 — ROLLS v. VESTRY OF ST. GEORGE THE MARTYR, SOUTHWARK.

and *Amelia Street*, running out of the *Old Kent Road* at right angles to it and ending at the railway. In order to improve the property, the Plaintiff determined to pull down all the buildings at the back of the houses fronting the *Old Kent Road*, and obtained the sanction of the Metropolitan Board of Works to his laying out a new street to be called *Marcia Road*, running out of *Upper Grange Road* in a straight line nearly parallel to the *Old Kent Road*, crossing *Amelia Street* and *Northampton Street* at right angles, and then turning off nearly at a right angle into the *Old Kent Road*. The south-west side of *Marcia Road* was for the most part at a distance of 129 feet from the *Old Kent Road*.

At the quarter sessions, on the 9th of April, 1878, an order was made for stopping up, as unnecessary, so much of *Northampton Street* as lay between *Marcia Road* and the railway. On the same day another order was made by which after stating a certificate by two justices of the peace, which recited a proposal by the Plaintiff to divert *Amelia Street* by diverting so much of the south-west end of the street as measured 129 feet from the *Old Kent Road* (the part of *Amelia Street* between *Marcia Road* and the *Old Kent Road*) in a north-westerly direction, so as to enter and join *Northampton Street* at a point in *Northampton Street* 129 feet or thereabouts from the *Old Kent Road*, and so as *Amelia Street*, when so diverted, should be continued in a south-easterly direction and join the *Upper Grange Road* at a point distant 125 ft. 6 in. from the *Old Kent Road*, and recited the acceptance of the proposal by the vestry of the parish of *St. George the Martyr*, and certified that they had viewed the highway so proposed to be diverted, and that the proposed new highway would be more commodious to the public than the old highway, it was ordered "that the said highway mentioned and described in the said certificate be diverted and turned accordingly, and the new highway therein also mentioned and described be opened in lieu thereof."

The portion of *Amelia Street* thus ordered to he diverted was the part lying between *Marcia Road* and the *Old Kent Road*.

The Plaintiff formed *Marcia Road* and opened it for traffic.

The vestry gave notice to the Plaintiff that he must not convert to his own use the soil of that part of *Northampton Street* which had been ordered to be stopped up, and must not stop up *Amelia*

Street or convert any part of the soil thereof to his own use, until he had purchased the same and obtained a conveyance thereof from the vestry.

The Plaintiff claimed to be entitled to convert to his own use the part of *Northampton Street* which had been ordered to be stopped up, and that part of *Amelia Street* which was ordered to be diverted, being the part lying between *Marcia Road* and the *Old Kent Road*. The parties concurred in stating a special case for the opinion of the Court on the above questions.

The case was heard before the Master of the Rolls on the 13th of January, 1880.

Dunning (*Chitty*, Q.C., with him), for the Plaintiff:—

Under sect. 96 of the *Metropolis Local Management Act*, 1855, it is provided "that the streets being highways, and the pavements, stones, and other materials thereof, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situated." This cannot mean that the vestry became the absolute owners of the soil. The word "vest" must be taken to have a qualified meaning, namely, that the streets are to vest for the purposes of the Act. The words of the section cannot mean that the vestry are empowered to sell the streets. It would be an unreasonable construction to hold that a body like the vestry have power to take land compulsorily for the purpose of making a street, and then, when it is no longer wanted for a street, that they are entitled to sell it.

In the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), sect. 149 is similar in terms to sect. 96 of the *Metropolis Local Management Act*, and on that section there is a decision in the case of *Coverdale* v. *Charlton* (1), which, it must be admitted, is opposed to the construction for which I contend, for it was there held that the property in the soil, which under that section vested in the local board, so far vested that they could demise the right of pasturage thereon.

Davey, Q.C., and *Everitt*, for the Defendants, were not called on.

(1) 4 Q. B. D. 104.

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JESSEL, M.R.:—

As regards the question of the construction of the Act of Parliament, that is, in my opinion, covered by the decision of the Appeal Court in the case of *Coverdale* v. *Charlton* (1); and, that being so, not only is it not necessary for me to express an opinion, but it would be improper to do so. If I agreed with the decision, my agreement could add nothing to it in point of weight or authority. If I disagreed with it, it would not detract anything from its weight or authority; in any case it is binding upon me. It must be considered that I neither agree with it nor disagree with it. It has relieved me from the trouble and difficulty of considering and deciding as to what is the true construction of the section in question, and I am not unthankful to be so relieved.

The decision in the case of *Coverdale* v. *Charlton* was in substance this, that a property in the road or street, that is, in the surface and subsoil to a certain depth, was vested in and passed to the vestry or district board, as the case may be; in this case it is the vestry. Now, that that was the decision is plain from looking at every one of the judgments. Lord Justice *Bramwell* says at the end of his judgment on this portion of the subject (2): "That would shew that 'street' comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it." That is his conclusion. There is a property in it to some depth. He does not define the depth, but it must be considerable, for among other powers the vestry has a power of raising or lowering the level of the street. Lord Justice *Brett* says (3): "If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The Legislature have, because the right of owners to the soil in a 'street' is of so little value, intentionally taken away that right, and have given it to the extent I have mentioned to the local board. I think

(1) 4 Q. B. D. 104. (2) 4 Q. B. D. 118.
(3) 4 Q. B. D. 121.

that the local board, with regard to the first lane, had to a certain depth of the land and to the whole surface the ordinary rights of proprietors." What that depth was he does not define quite accurately, because he does not think it necessary to do so—that is, in measurement; but he previously says: "It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers"—the word "raise" is, I have no doubt, a mistake for "pave," because every street is not raised—"for at the present day, there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used, as streets are used." Therefore he decides that to that depth the local board are entitled, and that they have a right of property in it; that the Legislature has taken away, in this case, without compensation, the ownership from the proprietors because it was of little value, which is the reason, he thinks, that induced the Legislature to do so.

Then Lord Justice *Cotton* is a little stronger still in favour of the board as I read his judgment. I am not sure he would not have gone further in favour of the board if he had been left alone. After discussing the various sections of the statute, and shewing that the sewers are vested under one section, he says (1), "It is impossible, I should say, to attribute to any one the intention of using in sect. 13 the word 'vest' in a different meaning from that used in sect. 12, which is the immediately preceding section. Therefore, on the true construction of this Act of Parliament"—and the clause in the *Public Health Act*, 1875, is the same, though the Act is not the same, so that for this purpose it is the same as was very fairly admitted by Mr. *Dunning*—"the meaning to be given to the words 'vest in' must be 'passed to and vested in' the local board; it is sufficient in the present case to say that the street and the surface vested in the local board some property in soil for the purpose for which it was to be used, and in my opinion I must hold that the 'street' is a material thing, and that under this clause it vests in the local board."

Thus all three Judges agree that the property in the street,

(1) 4 Q. B. D. 126.

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which means not merely the surface, but the surface and the subsoil to a considerable depth, vests in the vestry or the district board.

That being so, the question arises whether, if they divert the street or stop it up, they still have any property in it? Once vested, who is to take it away? It is suggested by Mr. *Dunning* that it may mean vested for the purposes of this Act, and when there is no purpose of the Act, the vesting is to cease. In the first place those words are not there, and therefore I have no right to insert them, and in the second place there is the 154th section which clearly contemplates the sale or letting of land or property not required for the purposes of this Act. The 154th section is in these words: "The Metropolitan Board of Works and any district board or vestry may sell and dispose of any land purchased by them under this Act."—If they have purchased land and made a street upon it, they may still sell it—"and any property whatsoever vested in them under this Act, which it may appear to them may be properly sold or disposed of." It was said that is absurd, that they may go and sell the streets. But the answer is this, that these are public bodies elected by the ratepayers, and the Legislature has only delegated these powers to these public bodies under the notion that it will not appear to them that property can be properly sold and disposed of when it cannot be properly sold and disposed of. It would be utterly unreasonable, it appears to me, to assume that the Metropolitan Board of Works or any district board would ever decide that a street actually used by the public could be properly sold or disposed of, and the Legislature may safely leave such a question to such bodies. That is the meaning of the Legislature. Then at the end of that section it is provided that "any such board or vestry may let any land purchased by, or vested in them under this Act, and which, for the time being, is not required for the purposes thereof." That is, the land may be let when they do not require it for the purposes thereof for the time being. If they disuse the land they may sell it, and if they disuse the property they may sell it.

Then it is said it would be a little unreasonable to say that they may take away property from the landowner for the purposes of a

street, and when they no longer want it for the purposes of a street they may be at liberty to sell it. But the answer is this (if Lord Justice *Brett* is right) that the property was of so little value that it was not worthy of consideration, and that the Legislature took it away without compensation. Having once taken it away, why should the landowner get it back free from the right of way over it—for that is the contention of the landowner—why should he get that for nothing? They have got rid of the right of way at a great expense probably by buying new land to make a new street, and why should they not sell the old one to pay for the new?

It does appear to me that the contention of the landowner is not a whit more reasonable than the contention suggested on the other side. I prefer to adhere to the literal meaning of the words, which to my mind are free from ambiguity, and therefore the argument of reasonableness has no place. It seems to me the case is covered by the decision in *Coverdale* v. *Charlton* (1). The moment you decide that the property to this depth is vested in the board, they may, when they do not want it, sell it, because it may properly appear to them that it should be sold, and no doubt the Legislature contemplated that they might apply the proceeds in the purchase of a substituted or other street which may be made when this is rendered useless.

I answer the first two questions in the negative, and as the landowner has assumed rights of property which do not belong to him, the usual result will follow, and he must pay the costs.

C. A.

The Plaintiff appealed. The appeal was heard on the 14th of June.

Sir *F. Herschell*, S.G., *Chitty*, Q.C., and *Dunning*, for the Appellant:—

The Master of the Rolls founded his decision on *Coverdale* v. *Charlton*, upon which he gave no opinion, but considered himself bound by it. We admit its authority, but deny its applicability. It is not contended by the vestry that the whole freehold ever vested in them, and *Coverdale* v. *Charlton* shews that it did

(1) 4 Q. B. D. 104.

C. A. 1880 — ROLLS v. VESTRY OF ST. GEORGE THE MARTYR, SOUTHWARK.

not, but only the surface and some depth below, what depth nobody can say. The Master of the Rolls says that according to that decision the streets are vested in the local authority, and that there are no words in the Act to divest them. We say no divesting words are wanted. The statute 18 & 19 Vict. c. 120, s. 96, provides that, "All streets being highways, and the pavements, stones, and other materials thereof shall vest in, &c." Under these words we say that what is vested is the streets, which are highways, *i.e.*, all streets which for the time being are highways and nothing else. When they are stopped up they cease to be streets, the thing which was vested has ceased to exist, and the owner of the soil is remitted to his old rights. There is nothing in this that conflicts with *Coverdale* v. *Charlton* (1). That case only decided that while the street was a street the soil was so far vested in the board that they could demise the pasturage; it decided nothing as to a stopped-up street. The express vesting of the stones and pavements favours a restricted view of the other words in the section. There is a power of sale in sect. 154, and if these disused streets remain vested in the board they must sell them; but how are they to sell when they have not the entire freehold, and cannot give a purchaser support for his buildings? This strongly supports the view that the streets only remain vested in the board while they are streets. *Vestry of St. Mary Newington* v. *Jacobs* (2), though not in point on the present question, illustrates the general nature of the rights of the vestry. In construing these sections it must be borne in mind that the Legislature can create a right of a kind not known to the common law: *Brumfitt* v. *Roberts* (3); so there is no objection to holding that there is lodged in the vestry a special kind of property which comes to an end when the purposes for which it is wanted are determined. In the *Highway Act*, 5 & 6 Will. 4, c. 50, there is no provision as to the soil of an abandoned highway, but in the older statutes, 13 Geo. 3, c. 78, s. 17; 55 Geo. 3, c. 68, s. 2, there were provisions for selling it—giving a right of pre-emption to the landowner. In *Burn's* Justice (4), it is suggested that the soil of a stopped-up highway vests in the landowner. The contention

(1) 4 Q. B. D. 104.
(2) Law Rep. 7 Q. B. 47.
(3) Law Rep. 5 C. P. 224.
(4) 30th Ed., Highways, p. 1035.

of the vestry is most unreasonable. If they had bought our land under sect. 150, we might, under sect. 155, have reserved a right of pre-emption, but now, when they are getting a new street for nothing, they say that all our rights to the old streets are gone. As to *Amelia Street*, when a new street has been opened in lieu thereof, we contend that it is in the same position as if it had been ordered to be stopped up.

Davey, Q.C., and *Everitt*, *contrà* :—

The Appellants profess to accept *Coverdale* v. *Charlton* (1), but their arguments really deny its authority. That case decided that the Board had a right of property which they could transfer to a lessee. The Appellants in substance are contending that the vestry has nothing but a right of user. According to *Coverdale* v. *Charlton* they have a right of property. Where is the divesting clause?

[JAMES, L.J. :—An estate given to a woman *durante viduitate* ceases without any divesting clause; the Appellants say that this case is similar.]

There are no words in the Act limiting the duration of the estate, or saying that the street shall be vested only so long as it is a highway. *Hinde* v. *Chorlton* (2) went on the ground that there was no estate, only a right of user.

[JAMES, L.J., referred to *Dyson* v. *Collick* (3).]

That case merely decided that the party was in possession of the land under a licence. Mr. *Chitty* says that the Act creates a new kind of statutory property, but there is nothing in the Act to justify importing words limiting the duration of the estate. The estate, therefore, must be a fee simple. In sect. 154 power is given to sell property vested in the vestry under the Act; they have power to sell whatever they have got, which negatives the limited estate contended for by the Appellants, for of course they cannot sell a street while it is a highway, so they must have it vested in them when it ceases to be a highway, otherwise there would be nothing on which the power to sell could operate. The

(1) 4 Q. B. D. 104. (2) Law Rep. 2 C. P. 104.
(3) 5 B. & A. 600.

C. A. 1880 ROLLS v. VESTRY OF ST. GEORGE THE MARTYR, SOUTHWARK.

Act 41 & 42 Vict. c. 77, s. 27, excludes mines from the operation of a very similar vesting clause in the Public Health Acts, which is against the view that such a clause merely relates to the surface.

[JAMES, L.J.:—That enactment was intended to remove a possible though unreasonable doubt.]

We ask the Court to give the natural meaning to the word "vest" in sect. 96. That clause vests the stones, &c. Can it be contended that they vest only for a determinable estate?

[COTTON, L.J.:—The argument against you is that the words "streets being highways" mean "streets so long as they are highways," and that does not apply to the stones.]

We say that "being highways" means "being highways at the time of vesting."

[THESIGER, L.J.:—"Being highways" must surely be construed so as to include future highways.

COTTON, L.J.:—The words cannot be taken as intended to describe certain streets which are to vest, but to give a general description of what shall be vested at any time.]

We say that a future street being a highway vests and vests for all time. Sect. 99 distinguishes the cases where the freehold is in a private owner from cases where it is in the vestry. Sect. 68 vests all sewers absolutely in the vestry. There are no words on which it can be contended that the estate is limited.

[JAMES, L.J.:—If a sewer is abandoned it would be a startling thing to say that the space remains for all time the property of the vestry.]

Sect. 42 incorporates the vestry for the purpose of holding land. Sect. 93 transfers to them all property vested in any commissioners for purposes connected with powers given to the vestry, and sect. 154 enables them to sell what is not wanted for the purposes of the Act. We say, then, that every street which was when the Act passed or afterwards becomes a highway vests. The Appellants argue that when a street has ceased to be a highway, the thing which has vested ceases to exist. That is a fallacy. The

argument would be sound if the Appellants were right in what lies at the bottom of their contention, viz., that the vestry have only a right of user. What has vested is a certain piece of land for the purpose of being used as a street; what ceases to exist is only the right of user.

[JAMES, L.J., referred to *Co. Litt.* (1) as to a grant of *totam vesturam terræ*, enabling the grantees to maintain trespass.]

Coverdale v. *Charlton* (2) shews the soil to be vested in us. A similar view was taken by Vice-Chancellor *Kindersley* in 1862, in *Wandsworth Board of Works* v. *London and South Western Railway Company* (3), and by the Master of the Rolls in *Taylor* v. *Corporation of Oldham* (4). The soil is vested in the vestry for the purposes of the Act, which are to employ it for a street while wanted for a street, and when no longer wanted to sell it. The Legislature might have given a right of pre-emption, but has not done so except where a vendor, sect. 155, expressly reserves it. In *Brumfitt* v. *Roberts* (5) it was held that there was a mere right to use, not giving an estate. Here, according to *Coverdale* v. *Charlton*, we have an estate, so that that case is inapplicable. As to *Amelia Road*, there has been no order for stopping it up. Under 5 & 6 Will. 4, c. 50, s. 91, an order for that purpose is requisite, and none such has been obtained: *Rex* v. *Justices of Kent* (6).

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls in this case ought not to be affirmed. With all respect to that learned Judge, it does not appear to me to be a legitimate corollary from the decision in *Coverdale* v. *Charlton* (7), which is binding upon us, and in which if not binding upon us I think I should myself have been prepared to concur. What that case decided, and all that it was necessary to decide in that case, was that something more than an easement passed to the local board, and

(1) 4 b.
(2) 3 Q. B. D. 376.
(3) 8 Jur. (N.S.) 691; 10 W. R. 814.
(4) 4 Ch. D. 395.
(5) Law Rep. 5 C. P. 224.
(6) 10 B. & C. 477.
(7) 4 Q. B. D. 104.

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that they had some right of property in and on and in respect of the soil which would enable them as owners to bring a possessory action against trespassers. Now what was that something more? It is impossible to read any of the three judgments delivered on that occasion without seeing that in the view of the learned Judges the soil and freehold in the ordinary sense of the words "soil and freehold," that is to say, the soil from the centre of the earth up to an unlimited extent into space, did not pass, and that no *stratum* or portion of the soil, defined or ascertainable like a vein of coal, or *stratum* of ironstone, or anything of that kind, passed, but that the board had only the surface, and with the surface such right below the surface as was essential to the maintenance, and occupation, and exclusive possession of the street, and the making and maintaining the street for the use of the public.

Then if that were so, and if the word "street" did not include the whole of the soil and freehold measured longitudinally by a certain number of yards and latitudinally by a certain number of yards, the street being nothing but the mode by which you ascertain dimensions, then the word "street" in the Act is not to be applied in what would be the ordinary sense of the word "street" in a conveyance, if there be in truth any ordinary legal sense of the word "street" as a description of property to be conveyed, which I am not satisfied that there is. But if it is competent to limit the extent of the right of property by reference to the general purview of the Act of Parliament and the purposes for which the thing is vested in and given to the public authority, it seems to me it is equally competent, equally right, and equally reasonable to limit that right in point of duration. It seems to me very reasonable then to interpret this enactment in a way which gives everything that is wanted to be given to the public authority for the protection of the public rights without any unnecessary violation of the rights of the landowner, and to say that according to its true construction what is to vest is not those pieces of property which have now got the name and are distinguished by the name of streets, but those things which now, or at any time hereafter, shall for the time being be streets and highways within the district. It appears to me that the legiti-

mate construction of the enactment that streets being highways shall vest is that streets if and so long as they are highways shall be vested. There are no words of inheritance, there are no words of perpetuity in the Act, there is nothing to say whether the streets are to vest in fee simple or for any limited estate, and it appears to me that they are given to and vested in the public body for the purposes of the Act and during the time for which those purposes require them to be held, and no longer. Words of divesting or defeasance are not required, because to my mind the interest of the vestry is exactly like a limited estate. If an estate is given to a woman during her widowhood words of defeasance are not required to divest it on her marriage, because the estate has ceased when the original limit is arrived at. So in this case it appears to me that when the thing has ceased to be a highway, when it has ceased to be a street, then it ceases to be vested, because the period for which it was to be vested in the board has come to an end. I may give as an illustration the clause to which we have been referred on both sides as throwing light on the case —the clause with regard to sewers. It appears to me that it would be a very strong thing indeed to say that because the sewer, the cylinder of iron or brickwork which is put in the ground for the passage of the sewage, with the inclosed space, is vested in the public body, then if the system of sewage is entirely diverted and new sewers made, and the materials taken up and the earthwork filled in, there would still be vested in the public body a right of freehold, a right and estate in perpetuity in that portion of the earth, wherever you could ascertain it, which had been at some time or other occupied by the sewer, although every trace of a sewer had been obliterated and the space filled up. That would be a very unreasonable interpretation, and I take it the same rule of interpretation is applicable to the case of a highway as to that of a sewer. If so, it appears to me that no difficulty arises from the clause which directs or authorizes the vestry to sell, because, of course, they can sell any property absolutely vested in them; but as to property their interest in which ceases they have nothing to sell. The question whether there has been a proper certificate given as to *Amelia Street* does not appear to me to be raised in such a way as to enable us to deal with it.

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COTTON, L.J.:—

I am of the same opinion. I will first deal with the case as it applies to the road which undoubtedly has been stopped up, that is part of *Northampton Street*, and I will deal presently with the question raised as to *Amelia Street*.

The Master of the Rolls considered that his decision was a necessary consequence of the decision in *Coverdale* v. *Charlton* (1), and a great deal of the argument has turned on that case. We must consider what that case decided and what it did not decide. The question there was as to the right of the Plaintiff in respect of the grass growing on the surface of a highway, which grass had been demised to the Plaintiff by the local board, and the Court of Appeal decided that the Plaintiff was right if the surface of the soil had vested in the local board, who were his lessors, and they decided that at least the surface of the soil was vested in the local board under the Act. They decided that what was described as a street in the section vested in the local board as if transferred and conveyed to them from those who had previously had the property in it, and that what was so transferred and vested in them was a material thing, and not a mere incorporeal right to protect the passage of the public over the highway. But they decided nothing as regards the duration or extent of the estate or interest in that material or physical thing. The estate or interest of the local board, whatever it was, was in that case undoubtedly still continuing in them, and none of the Judges, so far as I can see, intended, and certainly I did not intend, to decide what was the period for which this material thing was vested in the local board. That is the question which we have to decide in the present case, and I agree with the conclusion at which Lord Justice *James* has arrived, that the estate and interest of the vestry are limited by reference to the period for which the street is used in a particular way, and that although there is no divesting clause, yet the estate and interest of the vestry cease when and if this (which I call a street) ceases to be used as a highway. That the street here means the material thing is shewn by the interpretation clause, which expressly includes bridges and certain other material things, but the only way in which we can see what the intention

(1) 4 Q. B. D. 104.

of the Legislature was as regards the duration of estate is by looking at the words, "streets being highways," and I think the reasonable construction of these words is "streets for the time being used as highways." The duration or period of the estate then is that during which the street is used as a highway, and as future streets when they become highways will become vested in the local board, so existing streets when they cease to be highways will be no longer vested, the period of the estate vested in the local board having under the words of the section ceased when the purpose for which they were vested has ceased.

That appears to me to be the period or limit of the estate which can fairly be collected from the words of the Act of Parliament, and although we ought not to be influenced in the construction of clear words by any hardship which may arise from a particular construction, it is not immaterial to observe that this gives a reasonable operation to the Act, having regard to the fact that where the local board purchase there is power to preserve a right of pre-emption; but where a street is otherwise than by purchase vested in the local board no right of pre-emption is given to the former owner.

I ought to refer to two matters which have been mentioned in argument as important. Sect. 154 only comes to this, that if the board have property vested in them for an estate which continues, though the purposes for which it was vested in them have come to an end, then there is power to sell and dispose of it. But that is satisfied by applying it to property which has become vested absolutely in the board, and cannot affect the construction of the section which we have to consider.

As regards 41 & 42 Vict. c. 77, s. 27, which enacts that mines shall not vest in the board under similar words in another Act of Parliament, that enactment may have been made *ex abundanti cautela*, either in consequence of the decision in the Court below in *Coverdale* v. *Charlton* (1), or without reference to that decision; but it was to correct a supposed defect in another Act of Parliament, and if we are satisfied that the true effect and construction of this Act are such as we have stated, we ought not, in my opinion, to construe it differently, because Parliament, considering that an Act of Parliament in similar terms might possibly be held to have

(1) 3 Q. B. D. 376.

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an effect injurious to the landowner, has thought fit to guard against its having that effect.

I have dealt hitherto with the street which has been ordered to be stopped up. As regards *Amelia Street*, a question which does not seem to me to be fairly raised on the special case, has been argued, namely, that there ought to be a fresh and separate order for stopping up a portion of *Amelia Street*. I am bound to say that, in my opinion, that is not the true construction of the 85th and 91st sections of the Act of the 5 & 6 Will. 4, c. 50. Sect. 85 refers to two things, stopping up a highway on account of its having become useless, and diverting or turning a highway. Diverting and turning a highway, that is to say, making an alteration in its course, or a new course in substitution for an old way, of necessity involve the stopping up of the old way. I can hardly understand diverting a road unless a portion of the old road is to cease to be a road, the new road being substituted for it. The order here directs substitution of the new road in lieu of the old road, and that means that the new road is to take the place of the old road by putting an end to the old line of road and substituting for that a new line of road. Then comes sect. 91, and on this I agree with the local board that the Plaintiff cannot act under the order of diversion by physically stopping up the old highway until he has got a certificate from two magistrates that the condition precedent to stopping up the old line of road has been performed, that is to say, that he has actually made the new road which is to take the place of the old one. As it is stated that the certificate has not been obtained, I think we ought to answer the question in such a way as to shew that the right of stopping up this part of *Amelia Street* ought to be kept in suspense until the certificate has been obtained and has been produced.

THESIGER, L.J.:—

I am of the same opinion upon both points. The main question for our determination is as to the true construction of sect. 96 of the *Metropolis Local Management Act*, 1855, and in approaching the consideration of that section it is important to see what was the position of the law as regards highways at the time it was passed. The law regulating highways was substantially to be

found in the *General Highway Act*, 1835 (5 & 6 Will. 4, c. 50), and under that Act the management of highways was practically placed in the hands of the parish surveyor or the district surveyor as the case might be. That functionary had no rights in roads beyond mere rights of control and management which he exercised under the orders of the vestry, or the district board as the case might be, and both the property in the road and the possessory rights in respect of the road, subject of course to the right of passage on behalf of all the Queen's subjects, were vested entirely in the persons, or the successors of the persons, who had originally granted the right of passage to the public.

That being the position of roads under the Highway Acts certain powers were given by those Acts, not only to parishes themselves but also to owners of property, to obtain either the absolute stopping up of roads without any compensation being given in the shape of substitution of other roads, or the turning or diverting of roads, which, of course, involved the giving to the public something in compensation for the diverted or turned road; and in that state of things we come to the consideration of the Act of 1855, bearing in mind this, that under that Act the district boards or vestries of the parishes mentioned in schedule A. were substituted for the district or parish surveyor of highways, and the management and control of the highways within their respective districts were vested in them. But it appears to have been considered by the Legislature that in order to enable them to execute their functions properly it was necessary to give to them some further powers and greater rights than those which had been originally possessed under the *General Highway Act* by the surveyor of highways, and that is carried out by giving to them over and above the easement of passage which the public had, and which they might be able to enforce as representing the public, and over and above the rights of control and management to which they would succeed as invested with the functions of the old surveyor of highways, some right or property in the soil, or a portion of the soil of the street.

Now that being so, we should come to the consideration of sect. 96 with the presumption that whatever might be the additional powers or rights conferred for the purposes I have men-

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tioned, those additional powers and rights would only be co-extensive with the existence of the streets in respect of which those rights and powers were to be exercised. That presumption appears to me to be carried out by the terms of the section, although I am bound to say that it is not quite so clear in its language as might be desired.

Next, it is to be observed as bearing out the view which I have taken, and speaking of the section in its general character without going into the particular words, that that section first deals with the functions of these bodies, whether district boards or vestries, as substitutes for the old surveyor of highways, and it is only when that has been done that the section goes on to give them the rights to which I have referred, and which no doubt are rights greater than those possessed by the surveyor of highways. But it is obvious from what I have said that those rights or those powers, whichever they may be, were given to them for the purpose, and for the purpose only, of carrying out their functions as successors of the old surveyor of highways.

That being so, let us see whether anything which has been decided in *Coverdale* v. *Charlton* (1) in any way prevents this Court giving effect to the views I have shadowed out on the general consideration of the section. The effect of that case is substantially this, that sect. 96 has given to these bodies, over and above the mere easement of passage which the public possess, and over and above the right of control and management of the roads which the old surveyors of highways possessed, some right of property, some possessory right which would enable the district boards or the vestries to maintain actions in respect of that property or possessory right, and the decision of the Court does not seem to have gone one step beyond that. I would call attention to the judgment of Lord Justice *Cotton*, which, as one would expect from him, is very carefully worded, and which appears to me to state very concisely and accurately the effect of the decision. He says (2): "Therefore, on the true construction of this Act of Parliament, the meaning to be given to the words 'vest in' must be 'passed to and vested in' the local board; it is sufficient in the present case to say that the street and the surface

(1) 4 Q. B. D. 104. (2) 4 Q. B. D. 126.

vested in the local board some property in the soil" (he does not say what property) "for the purpose for which it was to be used, and in my opinion I must hold that the 'street' is a material thing, and that under this clause it vests in the local board." If that be, as I think it is, a correct summary of the effect of the decision, the case decides no more than this, that the district board or vestry had some property in the street—a property which is given for the purpose for which it was to be used, that is to say, in connection with these roads, or highways, or streets, of which they were constituted the managers—but does not decide what that property is, either as regards extent or duration.

Is there, then, anything in the words of the section which prevents our giving effect to the view which I have suggested as to its scope? I think not. The things in which some property is to be vested in the board are not described simply as "streets," but as "streets being highways." What is the meaning of that expression? Obviously it is not to be limited to streets being highways existing at the time of the passing of the Act. We, therefore, must go beyond the strict grammatical construction of the words, and the meaning appears to me to be this, that there are to be vested in these local authorities for the purposes to which I have referred the streets being highways which may from time to time exist within their districts. Consequently we have to look, not to the time of the passing of the Act, nor to the time at which any particular street or highway may have come into existence, but we are to look at the time when any question of the government or control of streets comes into question, and we are to see what are the streets "being highways" which are at that time managed by the board, and in respect of which, therefore, there is a property vested in them. If that be so, and I think it is so, then it is clear that at the time when this dispute arose (I am not dealing with the subsidiary question as to *Amelia Street*, but am assuming that the orders of the magistrates practically put an end to these roads), these streets had been put an end to, they were not streets, nor (if they were streets) were they highways. Therefore the thing being gone, and the objects for which the powers and rights were granted to the vestry being also gone, it seems to me to follow that those powers and rights are also gone.

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But it is said that sect. 154 keeps those rights alive and gives the vestry certain additional rights as regards the sale of the property. I cannot agree in that construction of sect. 154. In my opinion it leaves open the question of what they are entitled to sell. It says that they may sell and dispose of any land purchased by them under this Act, and any property whatever vested in them under this Act; but it is clear that they would have no power to sell either of those roads as long as they existed as roads; and as soon as they ceased to exist as roads, then, according to the proper construction of sect. 96, standing by itself, those roads ceased to be vested in them. Therefore the 154th section does not carry the case further.

Then the 155th section, although it has not a direct bearing on the matter, suggests to me a very strong reason why the Act should not be construed as having given the vestry an absolute right for all time in these roads, whether used as streets or highways or not. Under sect. 155 there is a right of pre-emption given, in certain cases of the local authorities deciding properly to sell land belonging to them, in favour of owners from whom or their predecessors in title such land was purchased. The present case is not included in the section, and yet if there is any case in which one would expect a right of pre-emption to be given (if a right of pre-emption were not superfluous), surely it would be the case where rights of property were given in streets whether existing at the passing of the Act or subsequently to come into existence without any will being exercised on the part of the owner of the land and without any compensation being given. Moreover, it seems to me that it would be a monstrous thing to say that in a case like the present the owner of land is to go to the trouble and expense of giving to the public a road which is found to be nearer or more commodious for the public than the old one, and then is to have to pay for the road which had been taken from him previously without payment and which becomes useless to the public in consequence of his going to that expense. Clearly under the old *Highway Act* he would have been entitled to the diverted part of that road, and it seems to me that he is equally clearly entitled to it under the Act of 1855.

There remains for consideration the subsidiary point as regards

Amelia Street, as to which I think there is no difficulty. It was put by Mr. *Davey* that no right passed to the Plaintiff in *Amelia Street* because there had been no order to stop it up, and it was put by Mr. *Everitt* in addition, that no right passed because the certificate that the new diversion had been put into proper condition had not been given. I quite agree with Mr. *Everitt* that that certificate is a condition precedent to the stopping up of the part which is no longer required in consequence of the diversion of the road, but I am clearly of opinion that that point is not open upon the terms of this special case. As regards the other point, that an actual order in so many words is necessary to stop up the road, I am of opinion that there is no ground for that contention. The *Highways Act* of 1835 deals with two distinct matters, one is the diversion or turning of a road, which involves of course the giving to the public something which by the terms of the Act must be nearer or more commodious than that which is taken from them. The other matter which may be dealt with is that, subject to the conditions provided by the Act, a road which is absolutely unnecessary may be stopped up without any compensation being given to the public. When we look at the terms of sect. 85 of the Act, and the terms of the notice which under that section is to be given, it is obvious that it was considered by those who framed that section, that *ipso facto*, by the very diverting and turning of a road, that portion which was originally used, and is no longer required to be used, is stopped, and, being stopped, the rights of the owner over it would no longer be fettered by the rights of passage on the part, or in favour of the Queen's subjects, who would have, in substitution and compensation, the road which is found to be nearer or more commodious. As regards the unnecessary road, the only thing to be done would be to stop it up, and the only notice that would have to be given would be to stop it. That being so, no doubt there is a little difficulty raised by the wording of the early part of sect. 91, but when the whole of that section is read, and the following sect. 92 is also read, I think it is obvious that the meaning I put on sect. 85 is carried out by those sections. Section 91 contemplates that the order for stopping up when the road is unnecessary, will of course be followed by the stopping up, and the stopping up only. It con-

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templates (although there are some expressions which tend to give a contrary impression) that the diversion or turning of the road is substantially a stopping up of the part diverted or turned, but inasmuch as there will be a question of the obligation of the parish to repair the substituted portion of road, it requires something more to be done before rights of property, unfettered by rights of passage, can be given to the owner of the diverted road, and therefore it says that the substituted road must be put into such a condition as to make it reasonable to impose on the parish the obligation of repair, and when it is put into that condition the matter comes before the justices, who view and inspect the road, and on their giving their certificate then, and not till then, the diverted portion of the road may be physically stopped, and rights of property existing over it are unfettered by the rights of passage.

THE COURT held that the questions must be answered in favour of the Plaintiff, subject to any question as to the right of the Plaintiff, physically to stop up the diverted road unless and until the requisite certificate under 5 & 6 Will. 4, c. 50, s. 91, had been obtained.

Solicitors: *Markby, Wilde, & Burra; Crosse, Sons, & Riley.*

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[1879 C. 487.]

Artizans and Labourers Dwellings Improvement Act, 1875 (38 & 39 *Vict. c.* 36), *schedule, sub-ss.* 8, 11, 12—*Compensation for Property taken—Provisional Award of Arbitrator—Omission of Interest—Final Award.*

The Metropolitan Board of Works, the "local authority" under *The Artizans and Labourers Dwellings Improvement Act*, 1875 (38 & 39 Vict. c. 36), served on the Plaintiff, the lessee of property required for an improvement scheme, a notice for him to send in a statement as to the nature of his claim. This was done, but the arbitrator appointed under the Act, through some omission, did not include the Plaintiff's interest in his provisional award, framed pursuant to sub-sect. 8 of the schedule to the Act. The Plaintiff subsequently received a two-days' notice to attend before the arbitrator that his claim might be considered. He attended accordingly, though under protest, and stated his claim, which was considered by the arbitrator, who altered his provisional award by inserting the amount of compensation awarded by him to the Plaintiff in respect of his interest. This was confirmed by the final award under sub-sect. 12. In an action to set aside the award:—

Held, that, notwithstanding the omission of the Plaintiff's interest from the provisional award, he was a "person interested" therein within the meaning of sub-sect. 11, that the proceedings of the arbitrator in considering his claim under that sub-section, and in altering the provisional award in respect of his interest under sub-sect. 12, were regular, and that the final award was good:

Held, also, that, if there had been an irregularity, it would have been formal only and would have been cured by sub-sect. 12 of the schedule.

THE Plaintiff, *Robert J. E. Carr*, was entitled under an underlease to a long unexpired term in three houses in *Little May's Buildings, Bedfordbury*, in the county of *Middlesex*, which he let at a profit rental of £90 a year.

In 1878 the Defendants, the Metropolitan Board of Works, being the "local authority" for the Metropolis under *The Artizans and Labourers Dwellings Improvement Act*, 1875 (1), served on the De-

(1) By this Act (38 & 39 Vict. c. 36) it is provided by sect. 2 that the local authority under the Act shall be, as respects the Metropolis, the Metropolitan Board of Works. By sect. 3 the local authority is authorized, on being satisfied by official representation (as provided by sect. 4) of the unhealthiness of a district, to make a scheme for its improvement.

Sect. 5 provides what shall be the requisites of any improvement scheme

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fendant a notice under the Act for the purpose of their *Bedfordbury* scheme (which scheme was confirmed by Act of Parliament),

of a local authority. Sect. 6 provides that, upon the completion of an improvement scheme, the local authority shall advertise such scheme, and within a prescribed time serve a notice on every owner, lessee, or reputed lessee and occupier of any lands proposed to be taken compulsorily stating that such lands are so proposed to be taken, and then the local authority shall present a petition, if such authority be the Commissioners of Sewers or the Metropolitan Board of Works, to a Secretary of State, and if such authority be an urban sanitary authority, to the Local Government Board (in the Act referred to as "the confirming authority"), praying that an order may be made confirming such scheme. The section then provides that the confirming authority shall make a local inquiry as to the scheme, and, on receiving the report made upon such inquiry, may make a provisional order authorizing the scheme to be carried into execution; also that a provisional order made in pursuance of this section shall not be of any validity until and unless it has been confirmed by Act of Parliament; and that it shall be lawful for the confirming authority as soon as conveniently may be to obtain such confirmation, and any provisional order made in pursuance of this Act when confirmed by Parliament, with such modifications as may seem fit to Parliament, shall be deemed to be a public general Act, and is in this Act referred to as the confirming Act.

Sect. 9 provides that when the confirming Act authorizing any improvement scheme of a local authority under this Act has been passed by Parliament, it shall be the duty of that authority to take steps for purchasing the lands required for the scheme, and otherwise for carrying the scheme into execution as soon as practicable.

Sect. 19 is as follows: "The clauses of the *Lands Clauses Consolidation Act*, 1845, with respect to the purchase and rating of lands otherwise than by agreement, shall not, except to the extent set forth in the schedule hereto, apply to any lands taken in pursuance of this Act, but, save as aforesaid, the *Lands Clauses Consolidation Act*, 1845, and the *Lands Clauses Consolidation Acts Amendment Act*, 1860, as amended by the provisions contained in the schedule hereto, shall regulate and apply to the purchase and taking of lands in *England*, and shall for that purpose be deemed to form part of this Act."

There is a proviso to this section as to the way in which the amount of the compensation payable in respect of any lands or any interests in any lands taken compulsorily under the Act is to be assessed.

The schedule to the Act contains provisions with respect to the purchase and taking of lands otherwise than by agreement, and otherwise amending the *Lands Clauses Act*, 1845.

Sub-sect. 1 of the schedule provides that the local authority shall as soon as practicable after the passing of the confirming Act cause to be made out maps and schedules of all lands proposed to be taken compulsorily (which lands are afterwards referred to as the scheduled lands), together with the names of all persons interested in such lands as owners, lessees, or occupiers.

Sub-sect. 3 provides for the deposit of such maps and schedules at the office of the confirming authority, and at the office of the local authority.

Sub-sect. 4 provides that it shall

requiring him to send in a short statement in writing of the nature of his claim.

The Plaintiff, accordingly, delivered a statement of his claim

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be lawful for the confirming authority, upon the application of the local authority, to appoint an arbitrator between the local authority and the persons interested in such of the scheduled lands, or lands injuriously affected by the execution of such scheme, so far as compensation for the same has not been made the subject of agreement.

The following sections provide for the proceedings on arbitration:—

Sub-sect. 6 provides that as soon as the arbitrator has been appointed the confirming authority shall deliver to him the maps and schedules, and the local authority shall publish once in each of three successive weeks, among other particulars, "a requisition directing the owners of or parties by this Act enabled to sell and convey or release any of the said scheduled lands, or any lands injuriously affected by the execution of the scheme of the local authority, or any interest in such lands, to deliver to the arbitrator, on or before a day fixed by the arbitrator and named in such requisition (and being a day not earlier than twenty-one days from the date of the insertion of the last of such notices), a short statement in writing of the nature of their respective claims."

The other sub-sections in the schedule so far as material are as follows:—

Sub-sect. 7: "The arbitrator shall, after the expiration of the period within which such claims are required to be delivered to him as aforesaid, and so far as such claims may not be settled by agreement, proceed to inquire into and adjudicate according to the basis provided in this Act upon the compensation to be paid in respect of the scheduled lands, and of the several interests in such lands, and the compensation to be made for injury to any lands as are mentioned in his appointment injuriously affected by the execution of the scheme of the local authority."

Sub-sect. 8: "The arbitrator shall, after due inquiry and examination, frame a provisional award, setting forth the compensation to be paid by the local authority in respect of the several interests in the scheduled lands, and also, where any inquiry relates to injury to any lands injuriously affected by the execution of the scheme of the local authority, the compensation payable in respect of such injury."

Sub-sect. 9: "The provisional award shall be deposited at the office of the confirming authority, and a copy shall be deposited at the office of the local authority."

Sub-sect. 10: "The arbitrator shall cause notice of such award to be given to all persons entitled to compensation under the same, or who have made a claim before such arbitrator as claimants for compensation; the arbitrator shall cause notice to be published once in each of three successive weeks, stating that a copy of the provisional award has been deposited at the office of the local authority, and he shall in the notice of the award given to such persons as aforesaid, and also in the published notice, appoint a time and place, or times and places, for holding a meeting or meetings to hear objections against such provisional award (the first such meeting to be not earlier than twenty-one days after the last day of publication of the said notice)."

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within the proper time to the Board of Works, but, through some omission, this was not sent in to Sir *Henry Hunt*, the arbitrator appointed under the powers of the Act, and the Plaintiff's interest was not included in the provisional award made by him under sub-sect. 8 of the schedule to the Act.

Before the arbitrator confirmed the provisional award the omission was discovered, and a two-days' notice was sent to the Plaintiff to appear before the arbitrator, that the amount of compensation payable to the Plaintiff in respect of his interest in the premises might be determined.

The Plaintiff, who was a solicitor, attended, with his surveyor, before the arbitrator under protest, and stated that he should not consider himself bound by the arbitrator's decision. However, he did not ask for an adjournment, and made a statement as to the rental of the property. This statement was not disputed by the counsel for the Board of Works, who contended that, having regard to the probable deterioration of the property and the repairs that would be required, the amount of compensation to which the Plaintiff claimed to be entitled was excessive.

The arbitrator who had examined the property, after considering the case, altered the provisional award by including the Plaintiff's interest, awarding him £1100 by way of compensation.

Sub-sect. 11: "The arbitrator shall hold such meeting or meetings according to such notices, and thereat hear and determine any objections which may then and there be made to such provisional award by any person interested therein, or adjourn the further hearing thereof, if the arbitrator see fit, to a future meeting, and may take any measures which he may deem proper for ascertaining the compensation payable in respect of any such lands or interests as aforesaid, or the justice or propriety of any other matter of such provisional award, and may from time to time, if he see occasion, appoint and hold further meetings for hearing and determining objections to such provisional award, of which further meetings, when not holden by adjournment, notice shall be given in manner hereinbefore directed."

Sub-sect. 12: "When the arbitrator has heard and determined all such objections, and made such inquiries as he may think necessary in relation thereto, and made such alterations (if any) as he may deem proper in the provisional award, he shall confirm such award under his hand and seal accordingly; and thereupon such award shall be final, and be binding and conclusive (subject to the provisions concerning an appeal hereinafter contained) upon all persons whomsoever, and no such award shall be set aside for irregularity in matter of form."

He then confirmed the award, which became final under sub-sect. 12 of the schedule.

The Plaintiff was dissatisfied with the amount, and refused to deliver the abstract of title to the property, and he now brought his action claiming that the Defendants might be restrained from entering upon and taking possession of the premises.

Evidence was adduced on both sides, and the shorthand writer's notes of the proceedings before the arbitrator were produced.

Ince, Q.C., and *H. M. R. Pope*, for the Plaintiff:—

The Plaintiff is entitled to have the award of the arbitrator in this case set aside, for, as his interest was omitted from the provisional award made under sub-sect. 8 of the schedule to the Act, the arbitrator had no power to include it in the final award under sub-sect. 12. Besides, he did not receive the twenty-one days' notice under sub-sect 6 to send in his claim. Moreover, he was not a "person interested" in the scheduled lands within the meaning of sub-sect. 11, so that the arbitrator could not alter the provisional award in respect of his interest.

Chitty, Q.C., and *Everitt*, for the Defendants:—

The evidence shews that the Plaintiff's claim was fully and carefully gone into by the arbitrator, so that he has no fair ground of complaint. Further, we contend that the requirements of the Act were substantially complied with. The Plaintiff was a "person interested" within the meaning of sub-sect. 11, and the arbitrator had full power to alter the provisional award. As he appeared before the arbitrator and stated his claim, he cannot now object on the ground that his proceedings were not regular. Besides, under the 12th sub-section the award cannot be set aside for irregularity.

JESSEL, M.R.:—

The objections taken by the Plaintiff really amount to very little indeed. It seems that he had an interest in the residue of a long term of years, by way of underlease, in some houses in *Little May's Buildings*, bringing in £90 a year. The Act of Parliament no doubt requires that notice of claims shall be sent in to the

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arbitrator. But in this case the local authority said, "Send them in to us, and we will take care that they are transmitted to the arbitrator." The Plaintiff sent in his claim in due time, but through some slip it was not sent to the arbitrator. That slip was found out before the final award was made; the particulars of the Plaintiff's claim were then forwarded to the arbitrator, and he sent a two-days' notice to the Plaintiff to consider his claim. When the Plaintiff (who was himself a solicitor) came before the arbitrator he brought his architect or surveyor with him, and he was ready to go on with his case. He says that he told the arbitrator that he should only go on with it on the terms of his not being bound if he did not like his award, but this the arbitrator did not consent to. The Plaintiff did not ask for an adjournment, but was ready and willing, and, I may say, quite able, to state his own case, for I have read his statement. He was not met on the other side with any evidence, for no evidence was wanted. All his statements of fact were admitted by the counsel for the board as being true; but he said that even if they were true, the Plaintiff claimed too much. His chief ground of opposition was, in effect, this: "I admit he gets £90 a year clear profit now, but the property is of such a kind that it will deteriorate, and the repairs will cost more as it gets older." That was the substance of his argument. He said to Sir *Henry Hunt*, "You know the property," and with that it was left to Sir *Henry Hunt*, who had seen the property, and who found the value of it to be £1100, which was not satisfactory to the Plaintiff, who was receiving £90 a year. I am unable, of course, to say whether that is the proper value or not, although, having regard to the position and eminence of Sir *Henry Hunt*, it is most likely quite right. But that is the way in which it stands.

Now, what has the Plaintiff to complain of? I cannot find anything. That he had not twenty-one days' notice is utterly immaterial. He was ready to go on at two days' notice; in fact he knew more about the property than any one else, and, so far as his interest was concerned, none of his facts were disputed; they were taken from his own mouth. He wanted no delay, therefore, to prove the facts, and none was asked for on the other side. As to law, there was no law in it. The only point really was whether his profit rent would continue for the whole term or part

of the term, depending on the probability of the property requiring money to be laid out in repairs, which is exactly a question for a surveyor after seeing the property to decide. Sir *Henry Hunt* is a surveyor, and saw the property.

If every possible formality required by the Act had been actually complied with, it appears to me that the Plaintiff would have been in the same position he is in now. I cannot imagine that anything that has taken place affected the judgment or ultimate decision of the arbitrator.

I have then to consider a question which is in fact technical and formal, and not substantial. But still, if the technicality is in favour of the Plaintiff, he must have justice done to him, because, whether this Act of Parliament was intended to effect a beneficial object for the public or otherwise, no man's property is to be taken from him without his consent except according to law. Therefore I have to consider whether the omission of the Plaintiff's interest from the provisional award made the final award a bad one.

I think there are two answers to the objections taken by the Plaintiff, which are, first, that the final award was good irrespective of the provision at the end of the 12th sub-section, and, secondly, that, if it had not been good without that provision, the latter words of the provision would make it good, because it confirms the award. It says, "No such award shall be set aside for irregularity in matter of form." Having come to the conclusion I have done, that, if there was an irregularity, it was only in matter of form and not in substance, I think the latter part of the 12th sub-section would have cured the irregularity in the award.

But I do not think the final award was irregular. I think it was quite regular, and therefore I have really not to resort to that reason.

The local authority are required by sub-sect. 1 to make out "maps and schedules of all lands proposed to be taken compulsorily, which lands are hereinafter referred to as the scheduled lands." That the Defendants did, and they also complied with the provisions of the 3rd sub-section by which they are required to "deposit and keep copies of such maps and schedules at the office of the local authority." All that was done. Then after such

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deposit they are to appoint an arbitrator. Then, as soon as the arbitrator is appointed, they are to deliver to him the maps and schedules, which they did. Then they are to publish a notice requiring the owners or persons interested to send in their claims.

Then, by the 7th sub-section this is provided: "The arbitrator shall, after the expiration of the period within which such claims are required to be delivered to him as aforesaid, and so far as such claims may not be settled by agreement, proceed to inquire into and adjudicate according to the basis provided in this Act upon the compensation to be paid in respect of the scheduled lands and of the several interests in such lands."

Then, by the 8th sub-section, after due inquiry and examination, the arbitrator is "to frame a provisional award, setting forth the compensation to be paid by the local authority in respect of the several interests in the scheduled lands."

Then, by sub-sect. 9, the provisional award is to be deposited, and by sub-sect. 10 the arbitrator is to cause notice of the award to be given to all persons entitled to compensation. In order to catch the people who do not get the compensation but who may be entitled to it, he is to issue an advertisement. What is the advertisement for? It is to give notice to people who do not get compensation under the award, but who may be entitled to compensation: "The arbitrator shall cause notice of such award to be given to all persons entitled to compensation under the same, or who have made a claim before such arbitrator as claimants for compensation; the arbitrator shall cause notice to be published once in each of three successive weeks, stating that a copy of the provisional award has been deposited at the office of the local authority, and he shall, in the notice of the award given to such persons as aforesaid, and also in the published notice, appoint a time and place, or times and places, for holding a meeting or meetings to hear objections against such provisional award."

This is a notice given to everybody who is entitled to compensation, and it is to be published for three successive weeks. It is a notice for the benefit of people who have not got compensation but who ought to have it. Surely, they are the people who are entitled to come in and say, "How is it we have been left out? We have an interest in the scheduled lands; you are bound to

make your provisional award right, and put in all those who are interested in the scheduled lands." It appears to me that that is the very thing contemplated by this section, otherwise a publication would be of no use, because everybody who is entitled under the provisional award to have compensation has actual notice given him. Then, by sub-sect. 11, "the arbitrator shall hold such meeting or meetings according to such notices, and thereat hear and determine any objection which may then and there be made to such provisional award by any person interested therein."

Now, I think that does include, although it is not necessary, as I shall shew in a moment, so to hold, a person whose interest has been left out. He is interested in the provisional award in seeing that it is right. The Act of Parliament says the provisional award shall state the amount of compensation to be paid for every interest in the scheduled lands. The person whose interest has been omitted says, in effect, "I am interested, I want that provisional award set right by inserting the amount of compensation payable to me, which has been left out." I do not think it is fairly arguable to say he is not interested in the provisional award, because, although he is not in the provisional award as actually framed, he is in it as it ought to be framed. He says: "You have got your provisional award wrong; there is a meeting for setting it right, and I am entitled to be put in." In my opinion those words are ample to cover such a case, when you look at the purview of the scheme of the Act of Parliament; although, even if they were not, there are some further words which include it. Having heard and determined the other claims, if a man were to come forward and say, "My interest has been omitted, I am entitled to compensation," that is an objection which the arbitrator is bound to hear. But then he may do something more. He "may take any measures which he may deem proper for ascertaining the compensation payable in respect of any such lands or interest as aforesaid, or the justice and propriety of any other matter of such provisional award." Under those words surely he is bound to make inquiries if any interests have been omitted, and he is also bound to do justice, if any interest has been omitted, and he has given no compensation, and to set it right. So that, if the first words do not include a person

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whose interest has been left out, as I think they do, it is quite clear that the subsequent words do, and when it is brought to his notice that an interest has been omitted it is the duty of the arbitrator to call on the person whose interest has been omitted, to state what compensation he requires, and to go into the case.

Then, by sub-sect. 12, "when the arbitrator has heard and determined all such objections, and made such inquiries as he may think necessary in relation thereto, and made such alterations, if any, as he may deem proper in the provisional award, he shall confirm such award." That is, the final award is the original award altered. This is the course pursued by the arbitrator in the present case. He found out that an interest had been omitted, and he called upon the person entitled to compensation in respect of that interest to substantiate his claim. He heard the case and decided it. He did what he was bound to do, altered the provisional award by putting in the interest omitted, and putting in the amount of compensation.

It appears to me that nothing could have been more regular and nothing more thoroughly in accordance with the purview and provisions of this Act of Parliament, and that the Plaintiff really has nothing to complain of, and no pretence for coming here, except that he thought he could avail himself of a mere technicality or mere irregularity in form for the purpose of appealing against the decision of the arbitrator, who, he thought, had given him less compensation than he was properly entitled to. As I said before, that is not a point before me. I think that the application entirely fails, and that the action must be dismissed with costs.

Solicitors: *Carr, Fulton, & Carr; The Solicitor to the Metropolitan Board of Works.*

CRAWSHAW *v.* CRAWSHAW.

M. R.
1880
June 7.

[1875 C. 66.]

Will—Construction—Direction that Share of Residue shall sink into Residue.

A testator, by his will dated in 1853, after appointing trustees and executors, gave to them his residuary real and personal estate in trust for sale, and to divide the proceeds "among all his children in equal shares" on their respectively attaining twenty-one, but to stand possessed of the share of his married daughter *I.* upon trusts for her during her life and after her death for her children, and, in default of children, upon trust for such persons as she should appoint; and in default of appointment, the testator directed that such share should "fall into and become part of his said residuary personal estate, and be paid and applied accordingly."

By a codicil the testator varied the ultimate gift by directing that his daughter's power of appointment should be limited to a moiety of her share of the residue, and that the other moiety should "fall into and become part of his residuary personal estate, and be paid and applied according to the trusts of his will."

The testator left seven children, including his daughter *I.*, all of whom attained twenty-one. The daughter died without issue, but having appointed the first moiety of her one-seventh share of the residuary estate to her husband:—

Held, that the second or unappointable moiety of her one-seventh was not undisposed of by the testator, but was divisible equally among his other six children as residuary legatees.

Humble v. *Shore* (1) and *Lightfoot* v. *Burstall* (2) considered.

FURTHER CONSIDERATION.

Joseph Crawshaw, by his will, dated in 1853, after appointing three persons his trustees and executors, gave and devised to them his residuary real and personal estate upon trust for sale, and to divide the proceeds (subject to an annuity thereby given to his widow) "among all my children in equal shares" on their respectively attaining twenty-one, with a clause of accruer as to the shares of children dying under that age: and the testator directed that his trustees should stand possessed of the share of his daughter *Isabella*, upon trust to pay the income thereof to her during her life for her separate use, and after her death upon trust, both as to capital and income, for her children as therein mentioned:

(1) 7 Hare, 247; 1 H. & M. 550.

(2) 1 H. & M. 546.

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"and if there shall be no such child of my said daughter, or being such they shall all die under the age of twenty-one, then, as well as to the capital of the shares and moneys as the annual income thereof, upon trust" for such persons as his said daughter should, notwithstanding coverture, by deed or will appoint; and in default of such appointment, "I direct that the said trust fund, moneys, and premises shall fall into and become part of my said residuary personal estate, and be paid and applied accordingly."

By a codicil the testator directed that the exercise of the aforesaid power of appointment by his said daughter should be limited to a moiety of her share of his residuary personal estate, "and that in the event of my said daughter dying without leaving children attaining the age of twenty-one years, the other moiety of her share shall fall into and become part of my residuary personal estate, and be paid and applied according to the trusts of my will."

The testator died in 1856, leaving surviving him his widow and seven children, including his daughter *Isabella* (the wife of *John Smith Grant*), all of whom attained twenty-one.

Isabella Grant died in 1873, without having had any children, but leaving her husband surviving her. Shortly before her death she had executed a deed appointing the moiety over which her father's codicil gave her a power of appointment, to her husband absolutely.

In 1875 this action was brought by one of the testator's sons against the trustees for the administration of his estate, and the usual judgment for administration was made on the 7th of June, 1876.

The question now was whether in the events which had happened the second, or unappointable moiety, of the share by the will and codicil bequeathed for the benefit of *Isabella Grant*, was divisible among the testator's other six children, or whether such moiety was undisposed of by the will and codicil.

Joshua Williams, Q.C., and *F. W. Maclean*, for the Plaintiff, submitted that the second moiety of *Isabella Grant's* one-seventh share was divisible among the testator's other six children, as residuary legatees.

E. W. Byrne, for another of the testator's children, took the same view, and cited *In re Coleman and Jarrom* (1).

Chitty, Q.C., and *Everitt*, for the testator's widow, contended that the moiety in question did not, on *Isabella Grant's* death without issue, go to the other residuary legatees, but was undisposed of by the will and codicil: *Humble* v. *Shore* (2): *Lightfoot* v. *Burstall* (3): *Shaw* v. *M'Mahon* (4): *Sykes* v. *Sykes* (5): *In re Bevis's Trusts* (6): *Kellett* v. *Kellett* (7).

[JESSEL, M.R., referred to *Atkinson* v. *Jones* (8).]

JESSEL, M.R.:—

I must say I entertain no doubt whatever upon this case. I quite agree with Vice-Chancellor *Wood's* observation in *Lightfoot* v. *Burstall*, that you cannot often usefully look at the construction of one will to enable you to interpret another will, though you may have to do so where the words are precisely similar: but here the words are not precisely similar to those in the cases which have been referred to.

I am not at all certain that if I had had to decide *Humble* v. *Shore* and *Lightfoot* v. *Burstall*, I should have decided those cases in the way they were decided; but now, holding myself bound by those cases, it is useless for me to discuss them. Those cases, however, were decided on this ground, that a direction that a share of residue should fall into the residue was mere surplusage, and meant nothing more than what the law would imply without it. In *Lightfoot* v. *Burstall* (9) Vice-Chancellor *Wood* says: "The fallacy of Mr. *Amphlett's* argument, ingenious as it was"—I should not have said it was either ingenious or fallacious—"consists in this assumption, that a direction that the share should sink into residue amounts to a gift of that share. Now, whatever suspicion we may have in such a case that the testator was misled by the supposed analogy of gifts of legacies, which,

(1) 4 Ch. D. 165.
(2) 7 Hare, 247; 1 H. & M. 550.
(3) 1 H. & M. 546.
(4) 4 D. & War. 431.
(5) Law Rep. 3 Ch. 301; Ibid. 4 Eq. 200.
(6) 20 W. R. 359.
(7) Law Rep. 3 H. L. 160.
(8) Joh. 246.
(9) 1 H. & M. 549.

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when directed to sink into the residue, do go to the residuary legatees"—why there should be any difference between a direction that a legacy shall sink into the residue and a direction that a share of residue shall sink into the residue is not at first sight obvious—"and whatever inclination there may be to hold that words of this nature must mean something more than the law would imply, and are not mere surplusage; it is impossible, on the other hand, to overlook the obvious fact, that if the testator's desire was that this share should go over in this manner, it would have been as easy to say 'shall go and belong to my other residuary legatees,' as to employ the words actually used in this case." So that, although the words the testator has actually used may have a meaning, the Court deliberately rejects them because he might have used words free from all possibility of argument.

Now, the actual decision in *Humble* v. *Shore* (1) was founded on the very ground that a direction that a share of residue shall sink into the residue is mere surplusage. Vice-Chancellor *Wigram* delivered two judgments in that case, and in the first he says: "If the testatrix, instead of merely revoking the bequest to her (*Sarah Whitaker*), except to the extent of her life interest, goes on to say, 'I will that it shall sink into the residue,' she expresses no more than the law would imply, and the case would be precisely the same as it was before, and the estate would be distributed to the next of kin. The whole question turns on this: besides saying 'it shall sink into the residue,' she gives a direction to her trustees that it shall be disposed of accordingly; and the question is, whether, having willed it to sink into the residue, and be disposed of accordingly, those words 'disposed of accordingly' mean disposed of as residue, or whether they mean something else." Then he says that on that point he would look into the will. Then in his second judgment the Vice-Chancellor says this: "The question, therefore, is, on the codicil, whether there is a gift of *Sarah Whitaker's* share to any one else. The first direction is that it shall sink into the residue of the estate, but that, of course, is no gift to any one else." If the learned Judge came to that conclusion, of course all the rest followed; but the conclusion is not very obvious. He then goes on: "But then there is a

(1) 1 H. & M. 550, n.

direction that it shall be disposed of 'as after mentioned,' and when you come to that to which the words 'after mentioned' refer, you find a direction that it shall 'sink into the residue of the personal estate, and be disposed of accordingly.' The question is, whether the direction that a share of the residue previously undisposed of is to be disposed of accordingly, is a gift to the residuary legatees. My opinion is, that it is not. I cannot find any gift to the residuary legatees in these words."

So that we find that these decisions are based simply on the ground that a direction that a share of residue shall fall into the residue is mere surplusage, and means nothing more than that the share of residue shall be disposed of in the way it shall be disposed of by law.

Such, then, being the law by which I am bound, I will now proceed to consider the will and codicil before me.

His Lordship then read the will and codicil as above stated, observing that the words differed from those in the two cases already mentioned; that the words of the ultimate gifts were not mere surplusage; and especially that, from the words of the ultimate gift in the codicil, the testator had expressly declared trusts of the second moiety of *Isabella Grant's* share for certain persons, the only question being who such persons were. In his Lordship's opinion such persons were the testator's other six children.

An order was accordingly made directing the second moiety of *Isabella Grant's* share to be divided equally among the testator's other six children.

Solicitors: *Ullithorne, Currey, & Villiers,* agents for *J. M. Jennings, Driffield; Emmet & Son,* agents for *Leeman & Co., York.*

M. R.

1880

June 19.

WHITING to LOOMES.

Stamp Act, 1870—*Stamp Duty—Vendor and Purchaser—Mortgage Deed—Ad valorem Stamp.*

A ten-shilling deed stamp on a mortgage deed is insufficient: therefore a purchaser is entitled, on a contract for sale with a mortgagor, to require the mortgage deed, where so stamped, to be stamped before completion to the full *ad valorem* duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in the conveyance.

ADJOURNED SUMMONS.

By an indenture dated the 10th of July, 1879, a leasehold public-house, called the *Russell Arms*, was assigned to *D. H. Whiting*, who, by a deed of even date, mortgaged the same by way of demise to Messrs. *Meux & Co.*, to secure the sum of £2100 and interest, with further advances.

D. H. Whiting subsequently entered into a contract for the sale of the public-house to *W. Loomes* for £3800, and it was proposed that Messrs. *Meux & Co.* should be paid off out of the purchase-money and join in the assignment to the purchaser.

On investigating the title it appeared that the mortgage deed bore a ten-shilling deed stamp only, whereupon the purchaser objected that the mortgage deed was insufficiently stamped, and must be stamped at the vendor's expense to the full *ad valorem* duty before completion.

The vendor declining to accede to the objection, the purchaser took out this summons under the *Vendor and Purchaser Act*, 1874, to have the question decided by the Court.

Bardswell, for the purchaser.

Davey, Q.C., and *Upton*, for the vendor:—

The deed is practically useless, as the mortgagees will join in the assignment to the purchaser. There is no conceivable case in which this mortgage deed would be necessary for the purpose of giving a good title to the purchaser.

[JESSEL, M.R.:—The legal estate may be the sole protection the purchaser may have. This particular kind of legal estate is always considered by conveyancers to be most valuable.]

This deed, if inadmissible as a mortgage deed in the hands of the mortgagees, may be at all events used as evidence by the purchaser for the mere purpose of shewing where the legal estate is. In *Evans* v. *Prothero* (1) Lord Chancellor *St. Leonards* held that a document stamped with a sixpenny stamp, although inadmissible as a receipt, was yet admissible as evidence of a contract. A deed bearing a common deed stamp of ten shillings is sufficient to pass the legal estate, and the only purpose for which this mortgage deed can now be wanted is to shew that the legal estate did in fact pass.

JESSEL, M.R. :—

As I always say in these matters, counsel are entitled to differ in opinion ; and when I say the question is unarguable, I only mean that I think so.

Now, the first point is whether the deed is well stamped. It is admitted it is not. No doubt it would be sufficiently stamped as a deed, but that will not do. "Duly stamped" in the 17th section of the *Stamp Act*, 1870, means stamped in accordance with the Act, and this deed is not so stamped. That disposes of the first point.

Then the other objection is that the purchaser cannot want the deed for any conceivable purpose. But the answer is he can want it—and for a most useful purpose. It may be his protection against a mesne incumbrance by the vendor. He gets the legal estate without notice ; but he cannot prove his legal estate without notice without getting this deed properly stamped.

To say that this is not a most valuable purpose is to contradict the whole history of judicial decisions with respect to the protection afforded to a purchaser who has got the legal estate and who can plead purchase for valuable consideration without notice.

I am therefore of opinion that the purchaser is entitled to have the deed stamped before he completes.

Solicitors : *Loxley & Morley ; Hunters, Gwatkin, & Haynes.*

(1) 1 D. M. & G. 572.

M. R.
1880
April 23.

SLADE *v.* TUCKER.

[1880 S. 105.]

Privileged Communication—Heralds' College—Recording of Pedigrees—Protest—Employment of Pursuivant—Unprofessional Agent—Legal Adviser.

A Pursuivant of the *Heralds' College* employed in the conduct and support of a protest against a pedigree sought to be inrolled in the *Heralds' College* is not a legal adviser, and therefore communications between him and his employer are not privileged in a Court of Law.

THE Plaintiff in this action was Sir *Alfred Frederick Adolphus Slade*, Bart., and the Defendant was *Stephen Isaacson Tucker, Rouge Croix* Pursuivant of the *Heralds' College.*

The Plaintiff, by his writ issued on the 6th of March, 1880, claimed delivery up to him by the Defendant of all books and papers in the possession or under the control of the Defendant being or containing printed or other copies or extracts from evidence taken in an action of *Slade* v. *Slade,* being an action of ejectment in Her Majesty's Court of Exchequer of pleas wherein *Marcus John Slade* was claimant and the present Plaintiff was Defendant; and for an injunction restraining the Defendant from taking any copies or extracts from the same books and papers or any of them, and from retaining or handing over to any person other than the Plaintiff any such copies or extracts, and from shewing the said books and papers or any of them, or any copy or extract of or from them or any of them, and from communicating the contents of them or any of them, or any information therein contained or therefrom derived, to any person or persons whomsoever.

The Plaintiff on the same day as the issue of the writ applied for *ex parte* and obtained an interim injunction restraining the Defendant from parting with or taking any copies of or extracts from the books and papers referred to in the writ, and notice of motion for an injunction in the terms of the indorsement on the writ was served upon the Defendant.

On the 10th of March, 1880, the Plaintiff served the Defendant with a notice requiring him to produce at the hearing of the

motion all books, papers, and other documents in his possession or power relating to the matters in question in the action, and particularly a certain volume or volumes of printed matter containing evidence in the action of *Slade* v. *Slade*, and described as "now or lately in your possession or power."

The Plaintiff, by his affidavit filed in support of his application, stated that the action of *Slade* v. *Slade* above referred to was an action brought for the purpose of recovering family estates, and that it was decided in his favour; that, after the trial, by an agreement made in pursuance of articles agreed upon pending the arguments in Court, it was, amongst other things, agreed by the parties to the action of *Slade* v. *Slade*, and also by Captain *John Ramsay Slade*, the eldest son of the claimant, that all original documents in the possession of the claimant relating to a certain marriage (being the question in issue in that action) should be delivered up to the successful party to be destroyed, and that in pursuance of such agreement the solicitors of the claimant sent to the present Plaintiff the whole of the copies of the evidence, consisting, amongst other things, of four printed volumes in the form of a special case; that in the year 1872 the claimant in *Slade* v. *Slade* died; that shortly before the issue of the writ in the present action the Plaintiff proposed to record the *Slade* pedigree at the *Heralds' College*, but was informed that it was the intention of Captain *John Ramsay Slade* to contest the Plaintiff's right to have the pedigree so recorded on the very ground which had been decided in *Slade* v. *Slade*; and that on the 7th of February, 1880, a formal protest was delivered by Captain *John Ramsay Slade* at the *Heralds' College*, and on the 10th of February other protests were delivered by other members of the *Slade* family. The Plaintiff, by his affidavit, then proceeded to state that Captain *John Ramsay Slade* had "retained the professional services of the Defendant," who, he said, was "employed as his pursuivant in supporting his aforesaid protest;" and that the Defendant had in his possession one of the copies of the four volumes of printed evidence and was using them against the Plaintiff's interest, and that the Plaintiff was informed and believed that the solicitors of the claimant in *Slade* v. *Slade* had applied to the Defendant and requested him to deliver up the

M. R. 1880 SLADE v. TUCKER.

volumes, and that the Defendant had refused to comply with such request.

The Defendant, by his affidavit in reply, admitted that he was employed on behalf of Captain *John Ramsay Slade* in support of the protest against the Plaintiff's pedigree, and stated that he was one of Her Majesty's Officers of Arms and occupied in questions of genealogy; that it was the practice of the members of the *Heralds' College* to obtain for their own use and reference copies of the cases and evidence in all Peerage and other important cases involving questions of pedigree and bearing upon the history of English families; that the action of *Slade* v. *Slade* was one in which he took particular interest, and he had individually and for his own private purposes collected much that was printed in the newspapers and otherwise relating to the action, but that he did not obtain at that time or subsequently all or any one of the four volumes referred to by the Plaintiff, who had been misinformed as to his having a copy of the said printed volumes in his possession, and that he did not possess, nor had he ever possessed any such copy; that he was necessarily unable to discard from his memory the facts connected with the case of *Slade* v. *Slade*. The Defendant also stated that he never had in his possession, custody, or power, any original documents relating to the matter in question.

On the 3rd of April, 1880, the Plaintiff served notice of his intention to cross-examine the Defendant upon his affidavit at the hearing of the motion.

The motion was now heard, and the Defendant attended for cross-examination, but objected to being compelled to give evidence on the ground that, where a pursuivant of the *Heralds' College* was employed in supporting a formal protest against a pedigree, any communications between him and his employer were privileged.

Ince, Q.C., and *Romer*, for the Defendant:—

The Defendant makes this objection as an assertion of the rights of the *Heralds' College*. It appears that by a patent granted by *George* III. the *Heralds' College* had conferred upon it the duty of registering the pedigrees of baronets. It is, by the custom of the college, necessary for a person objecting to a pedigree to lodge a protest, and in order to do so he has to be advised and assisted by

one of the officers of the college, who is technically called a pursuivant and sometimes a herald. We submit, therefore, that the Defendant is in the same position as a legal adviser. The case is analogous to that of the employment of a foreign lawyer.

[JESSEL, M.R.:—Not the least. Professional advice in *England* is confined to legal advice.]

The advice of the Defendant as pursuivant is necessary for the conduct of Captain *Slade's* cause in a recognised tribunal of the country, and is therefore within the privileged exemptions of a legal adviser or his intermediate agents, according to the rule stated in *Taylor* on Evidence (1).

[JESSEL, M.R., referred to the meaning of the term "legal adviser" as laid down in the same book (2), and said that if counsel could convince him that the Defendant was a legal adviser there would be an end of the matter.]

The position of a pursuivant is analogous to that of the obsolete Six Clerks in Chancery. He is an officer of the Court of Chivalry, to whom a suitor in that Court must go.

[JESSEL, M.R.:—I do not think that the communication with the Six Clerks was ever privileged. A communication to the Sworn Clerk was, but then the Sworn Clerk was the agent of the solicitor.]

The position of the parties here is that of client and adviser, and not that of principal and agent, and we place our case as high as we possibly can, viz., as being within the limits of the rule laid down by your Lordship in *Anderson* v. *Bank of British Columbia* (3).

[*Tomlin*, L. Dict. *sub nom.* "Herald" was referred to as defining the functions of heralds.]

Davey, Q.C., and *Smart*, for the Plaintiff, were not called upon.

JESSEL, M.R.:—

I never yet heard of the doctrine of communications between

(1) 7th Ed. p. 774, § 920. (2) 7th Ed. p. 765, § 911.
(3) 2 Ch. D. 644.

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principal and agent being privileged and protected. The rule is that protection is confined to communications between a client and his legal adviser, that is, between solicitor and client or barrister and client, and the doctrine goes no further, except as to the employment of the intermediate agents between the client and the solicitor, and the client and the barrister.

[His Lordship then directed the Defendant to answer the questions on his affidavit put to him by the Plaintiff's counsel, and it appearing that the witness had never had the volumes in question in his possession, or custody, or at his office, leave was given to the Plaintiff to amend his writ by adding other persons as Defendants.]

Solicitors for Plaintiff: *Ward, Mills, Witham, & Lambert.*
Solicitor for Defendant: *T. B. Lodge.*

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1810
April 21, 22.

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[1878 T. 118.]

HALL *v.* TURNER.

[1878 T. 122.]

Release—Compromise—Ignorance—Unexpected Accession of Property.

In consideration of certain payments by an executrix, persons interested in the estate gave a release of all claims on the estate to the executrix. It was afterwards discovered that property in which the testator was entitled to a share had during his life been sold at an undervalue. The executrix instituted and succeeded in a suit to set the sale aside, and recovered a large sum of money as part of the testator's estate:—

Held, that this money was not included in the release, and that the persons who gave the release were entitled to share in the money so recovered as part of his estate.

Howkins v. *Jackson* (1) distinguished.

THOMAS PRICE TURNER, by his will, gave to his wife *Maria Turner* all his shares in the *West of England Bank*, and all the household goods and furniture, plate, linen, china, glass, musical instruments, manuscripts, and other music, and music books, paintings, drawings, engravings, clocks, watches, jewellery, and all other chattels and effects (except moneys and securities for money) belonging to him, or in or upon his dwelling-house or elsewhere; and after giving some pecuniary legacies, he gave, devised, and appointed the rest, residue, and remainder of his estate, property, and effects, unto his wife *Maria Turner*, and his children *F. H. A. W. Turner*, *Maria Harriett Turner*, and *J. P. Turner*, subject as to *J. P. Turner* to a condition that he should appear and claim the same within two years. And he appointed his wife and *J. L. Ransom* executors.

The testator died on the 18th of February, 1868. On his death it was found that the completion of contracts for the purchase of real estate (specifically devised by codicils) would absorb a great part of his then known personal estate, and it was believed that his personal estate would be insufficient for the payment of his debts and legacies; some of the parties also had entered a *caveat*

(1) 1 Mac. & G. 372.

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against probate of the will and codicils. A compromise was then made, in pursuance of which a deed, dated the 3rd of July, 1868, was made and executed between and by *F. H. A. W. Turner*, and *Ralph Hall*, and *Maria Harriett* his wife, formerly *Maria Harriett Turner*, of the one part, and *Maria Turner*, the widow and executrix of *Thomas Price Turner*, of the other part, and thereby, after reciting the will and codicils and the probable deficiency of personal estate, and that on the death of certain annuitants under the will of *Joseph W. M. Turner*, R.A., there would be a further distribution of his estate amongst his next of kin, of whom *Thomas Price Turner* was one; and reciting that *J. P. Turner* had not appeared and claimed; and reciting the *caveat* and other proceedings, and that, for the purpose of preventing further litigation, and in consideration of the near relationship of the parties, the said parties had consented to enter into the following arrangement and compromise, that is to say:—That each of them, the said parties thereto, should pay the bills of costs of their own attorneys in relation to the opposition given to the proving of the said will and codicils or otherwise in relation thereto, and that the said *Maria Turner* should pay unto the said *F. H. A. W. Turner* the sum of £525, and should pay the legacies given by the said will to the said *F. H. A. W. Turner* and *Maria Harriett Hall*, and notwithstanding such alleged deficiency of present available residue to satisfy debts and legacies should pay the debts of the said *Thomas Price Turner*, deceased, and allow the said *F. H. A. W. Turner* and *Maria Harriett Hall* to participate in the further residuary estate of the said *Thomas Price Turner* in reversion payable on the deaths of the annuitants under the will of the said *J. W. M. Turner*, deceased, as thereinafter more particularly mentioned, and that thereupon the said *F. H. A. W. Turner* and *Ralph Hall* and *Maria Harriett*, his wife, should not further prosecute any contentious proceedings, but would withdraw all opposition to the proving of the said will and codicils, and should also execute to the said *Maria Turner* such release as thereinafter contained; It was witnessed that in pursuance of the said agreement, and in consideration of the premises, they the said *F. H. A. W. Turner*, *Ralph Hall*, and *Maria Harriett Hall*, did remise release, and for ever discharge the said *Maria Turner*, her heirs,

executors, administrators, estate and effects, whatsoever and wheresoever, and every part thereof, and the estate and effects of the said *Thomas Price Turner*, deceased, and every part thereof respectively, of and from all and all manner of actions, suits, cause and causes of action, and suits, debts, duties, sum and sums of money, accounts, reckonings, legacies, claims, and demands whatsoever at law and in equity which they the said *F. H. A. W. Turner* and *Ralph Hall* and *Maria Harriett Hall*, or any of them, or any other person or persons on the account of them, or any of them, then had, or could, should, or might at any time or times have, claim, challenge, or demand upon or against the said *Maria Turner*, her heirs, executors, or administrators, or other the executors or administrators for the time being of the said *Thomas Price Turner*, deceased, for or by reason or on account of the shares of residuary estate bequeathed to them by the will of the said *Thomas Price Turner*, deceased, or any part or parts thereof, or for or by means of any act, matter, or thing in anywise relating thereto, or by reason or on account of any distributive share or other interest whatsoever which they the said parties hereto of the first part might be entitled to in the estate and effects of the said *Thomas Price Turner*, deceased, either under the statutes for the distribution of the estates of intestates or otherwise howsoever, or for or by reason or on account of any matter or claim whatsoever of them the said parties thereto of the first part in anywise relating to the premises or any of them, excepting only the two legacies as aforesaid, and also excepting all further interest and share of residue under the will of the said *J. W. M. Turner*, R.A., including two leasehold houses and estate in *Harley Street*, and one in *Queen Anne Street, Middlesex*, and excepting the devise to the said *Maria Harriett Hall* by the said *Thomas Price Turner* of his interest in a piece of land at or near *Richmond, Surrey*, and excepting any estate, property, or interest for which the said *Thomas Price Turner*, deceased, was a trustee or *quasi* trustee, either solely or jointly with any other person or persons, and for which his estate was or might be in any manner responsible: and the deed contained covenants to indemnify *Maria Turner*.

Acting on this compromise *Maria Turner* paid the debts and legacies and the £525; and she alone proved the will and codicils.

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T. P. Turner was, as one of the next of kin of *J. W. M. Turner*, R.A., entitled to one-fifth of his estate, part of which consisted of certain plates, pictures, and engravings, which had in 1858 been sold to one *Jabez Tepper* for £2500, of which *T. P. Turner* had received £500 as his share. In 1873 these plates, pictures, and engravings were put up for sale by auction by *Jabez Tepper*, and produced about £40,000. *Maria Turner*, as executrix of *Thomas Price Turner*, one of the five next of kin of *J. W. M. Turner*, then instituted a suit against *Jabez Tepper* to have the sale to him set aside. After much litigation, a decree was made in 1877, declaring the sale to *Jabez Tepper* not binding on *Maria Turner* as executrix of *Thomas Price Turner*, and that she, as such executrix, was entitled to one-fifth of the net proceeds of the sale of the said plates, pictures, and engravings; and the money was accordingly paid into Court in the suit of *Turner* v. *Tepper*.

F. H. A. W. Turner then brought this action against *Maria Turner*, claiming a declaration that the deed of 3rd of July, 1868, did not extend to the right of *Maria Turner* to avoid the sale, and that the sum of £9065 consols (which then represented the one-fifth of the proceeds of the sale), and any cash standing to the credit of the action *Turner* v. *Tepper*, formed part of the residuary estate of *Thomas Price Turner*, and consequent relief.

A similar action was brought by *Hall* and his wife.

It was admitted that at the time when the release was executed none of the parties were aware of the value of the engravings, or of any right to set the sale aside.

Glasse, Q.C., and *Boome*, for the Plaintiff in *Turner* v. *Turner*:—

The deed of release was not intended to include this property, of which nothing was known, and cannot extend to it; *Bingham* v. *Bingham* (1); *Lindo* v. *Lindo* (2); *Anon.* (3); *Eaves* v. *Hickson* (4); *Cooper* v. *Phibbs* (5); *London and South Western Railway Company* v. *Blackmore* (6); *Gresley* v. *Mousley* (7).

[MALINS, V.C., referred to an unreported case of *Syer* v. *Gladstone*.]

(1) 1 Ves. Sen. 127.
(2) 1 Beav. 496.
(3) 31 Beav. 310.
(4) 30 Beav. 136.
(5) Law Rep. 2 H. L. 149.
(6) Ibid. 4 H. L. 610.
(7) 4 De G. & J. 78.

Higgins, Q.C., and *Crossley*, Q.C., for the Plaintiffs in *Hall* v. *Turner*.

J. Pearson, Q.C., and *Grosvenor Woods*, for *Maria Turner* in *Turner* v. *Turner*:—

First, she is entitled to this money under the specified bequest of paintings, drawings, engravings, and other chattels.

Secondly, if not, she is a purchaser under the deed of the 3rd of July, 1868. It is in fact not so much a release as a purchase. She agrees to pay £525 to the Plaintiff, and all the debts and legacies, and she has paid them. She took all the chances of loss, and ought to take the benefit of gain. What is to be done about the £525? Is she to lose that? She alone instituted the suit by which the money was recovered, and it was for her own benefit. Neither of the present Plaintiffs offered to contribute, and it was a difficult and expensive suit.

Bristowe, Q.C., and *Grosvenor Woods*, for *Maria Turner*, in *Hall* v. *Turner*:—

The deed was a compromise between members of a family, and cannot now be set aside. The parties were ignorant of the facts, and there is no ground for undoing what has been done: *Okill* v. *Whittaker* (1); *Gordon* v. *Gordon* (2); *Howkins* v. *Jackson* (3).

MALINS, V.C., after stating the facts of the case, and deciding that upon the construction of the will, and considering the nature of the property of the testator, the engravings were not bequeathed to *Maria Turner*, proceeded to say that the Defendant raised a second contention, namely, that at all events she was entitled under the deed of the 3rd of July, 1868. His Lordship then stated the facts which led to the execution of that deed, and read the principal parts of the deed, and continued:—

It is to my mind impossible to read this deed without seeing that it is addressed to the state of things and to the amount of property of which the parties were aware, and that it has no application and could have no application to property of the

(1) 2 Ph. 338. (2) 3 Sw. 400.
(3) 2 Mac. & G. 372.

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existence of which they were unaware. It is an arrangement with regard to a state of things then known; but as to these engravings, and the setting aside of the sale, it was impossible that it could apply to them. In a case of this kind it is the duty of the Court to construe the instrument according to the knowledge of the parties at the time, and according to what they intended, and not to extend it to property which was not intended to be comprised within it. There is no intention expressed to assign to the widow any property which might afterwards accrue to the testator's estate, or property which was not known. So far from that being the case, it is clear that the deed was only intended to apply to property the existence of which they were then aware of. I quite agree with the assertion made by Mr. *Woods* and other of the learned counsel that the words of release are in themselves abundantly sufficient, and if the deed is to be read literally and to be considered as including everything which they had known or might hereafter know, it is quite clear that this suit is barred by that release. But it has always been the rule of this Court to construe releases and documents of that kind with regard to the intention of the parties, and to refer in such cases to the state of the property which was known at the time. There cannot be a stronger illustration of this than is afforded by the case of *Lindo* v. *Lindo* (1), which is almost on all fours with the present case. The parties there made an absolute release to the executors of all claims and demands, and the deed stated that the property which they were dealing with was all the estate and property of the testator, and the question was whether these words extended to a property of the value of about £1300, to which none of the parties had any regard at the time, and which they knew nothing of; and it was decided by Lord *Langdale* that the words of the release must be read to refer to the state of knowledge which the parties had, and according to the intention which they had when they executed the deed.

The judgment of Lord *Westbury* in the case of the *London and South Western Railway Company* v. *Blackmore* (2) puts it very clearly. He said (3): "My Lords, there was a very small point to

(1) 1 Beav. 496. (2) Law Rep. 4 H. L. 610.
(3) Law Rep. 4 H. L. 623.

which my noble and learned friend has not adverted raised in the argument of the learned counsel—I think in that of Mr. *Greene* particularly—that the present Plaintiff has lost his right by the operation of a general release which he gave to the company on the occasion of some dispute between himself and the company which terminated in an agreement with respect to the wall and the maintenance thereof. Now it is impossible to accede to that argument. The general words in a release are limited always to that thing or those things which were especially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release. There is no difficulty, therefore, in holding that the present contention on the part of this Plaintiff, Mr. *Blackmore*, in respect of matters that subsequently arose cannot be at all affected by words in a release given anterior to the arising of the subject of the present dispute." Every word of that is applicable to the present case, because this was not a thing in the contemplation of the parties, and could not have been anticipated. The rule of the Court must be applied to a state of things which was known by the parties and was intended by them at the time.

Many cases were cited in the course of the argument, but I do not think I need refer to any of them except the case before me of *Syer* v. *Gladstone*. I should not attach much importance to my decision alone, but it happens that my decision in that case was affirmed by the Court of Appeal, and I am of opinion that it is particularly applicable to the present case. In *Syer* v. *Gladstone*, if my recollection of the facts is correct, Mr. *Bell*, a member of the firm of *Thomson, Bonar, & Co.*, retired from that firm, and upon the occasion of his retiring there was not a release executed, but by an order of the Court it was declared that he was released and discharged from all claims and demands from his partners, which was a complete bar to any claim up to the date of that order, precisely the same as if there had been a deed of release executed. But shortly afterwards it was discovered that at that very time the firm had sustained a loss by the delinquency of an agent of £100,000, or thereabouts, and it was most strongly

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argued before me that this order was an absolute bar to the claim, there being a full release given to Mr. *Bell* of all claims and demands. But I put a construction upon it to the effect that it was an order according to the state of knowledge of the parties, that they were in ignorance of this circumstance, and that if they had known of it a larger sum would have had to be paid, and therefore in that case I held that Mr. *Bell's* estate must contribute to the loss notwithstanding that he had obtained this release. That was taken to the Court of Appeal, and the appeal was dismissed with costs. Nothing can be more applicable to the present case, and that being the latest case upon the subject, I think it is not necessary for me to advert to any of an earlier date. But a case of *Howkins* v. *Jackson* (1) was relied upon, which, however, is different in its circumstances, and it is perfectly plain that Lord *Cottenham* there never intended to overrule or act against the principle enunciated in *Lindo* v. *Lindo* (2), as it was an assignment for valuable consideration, and therefore the assignee had that advantage. If in this case there had been an assignment to Mrs. *Turner* for valuable consideration of all property to which the husband might be entitled, then the case I have just referred to might have applied, but this being a mere release, in my opinion, it has no application. On these grounds, I am of opinion that she is not entitled as specific legatee under the will, and that she acquired no interest under the release except the release of all claims and demands in respect of property which was then known to exist. I am, therefore, of opinion that the Plaintiff in *Turner* v. *Turner* is entitled to what he asks; and that the Plaintiffs in *Hall* v. *Turner* are entitled to the same relief; there will be a declaration that these engravings formed part of the testator's residuary estate, and are to be equally divided between his wife and children.

Solicitor for *F. H. A. W. Turner: A. Pulbrook.*

Solicitors for Mrs. *Hall: Carr, Bannister, & Co.*

Solicitors for Mrs. *Turner: Guscotte, Wadham, & Daw*, agents for *Smith & Co., Crediton.*

(1) 2 Mac. & G. 372. (2) 1 Beav. 496.

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V.-C. M.
1880
May 4.

[1878 P. 137.]

Covenant by Married Woman—Separate Estate—Judgment—Existing Property—Restraint against Anticipation.

Judgment on the covenant of a married woman entitled to separate estate binds the separate estate which she has at the time when the judgment is given, including (if her husband is then dead) estate given to her separate use with a restraint against anticipation.

BY an indenture dated the 20th of January, 1875, and made between the Honourable *Gerald N. Fitzgibbon* and Lady *Louisa J. G. Fitzgibbon*, his wife, of the one part, and *J. Pike* and *A. Howden* (who appeared to be trustees for the *Reliance Assurance Society*) of the other part, in consideration of the sum of £3000 to *Gerald N. Fitzgibbon* and Lady *Louisa Fitzgibbon* advanced, a certain policy of assurance was assigned; and the said *Gerald N. Fitzgibbon* and Lady *Louisa Fitzgibbon* jointly and each separately for himself and herself covenanted with *Pike* and *Howden* that they the covenantors or one of them would pay to *Pike* and *Howden* the sum of £3000 and interest at the time and in the manner therein mentioned. By another indenture, dated the 17th of June, 1875, and made between Lady *Louisa Fitzgibbon* of the one part, and *Pike* and *Howden* of the other part, after reciting that under an indenture dated the 4th of August, 1866, Lady *Louisa Fitzgibbon* was entitled to receive the annual income of a sum of £15,000 payable after the death of Lady *Clare* out of her estate for the life of Lady *Louisa Fitzgibbon*, for her sole and separate use, free from the debts, control, or interference of any husband, it was witnessed that Lady *Louisa Fitzgibbon*, in consideration of £5000 to her paid by *Pike* and *Howden*, covenanted with them for the payment to them of £5000 and interest at the time and in the manner therein mentioned. And Lady *Louisa Fitzgibbon* assigned to *Pike* and *Howden* all her estate and interest in the said sum of £15,000 payable as aforesaid, and also a certain policy of assurance for £6000 by way of security for the repayment of the £5000 and interest.

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The sum of £2012 and interest remained due on the security of the first indenture, and £5000 and interest on that of the second indenture; and on the 12th of July, 1878, *Pike* and *Howden* issued a writ against Mr. *Fitzgibbon* and Lady *Louisa Fitzgibbon* claiming payment of these sums and interest out of her separate estate. The Countess of *Clare* died in April, 1879, having by her will bequeathed certain furniture and the residue of her estate to the separate use of Lady *Louisa Fitzgibbon*. The writ and statement of claim were amended on the 9th of July, 1879, and, after stating as above, stated that the Plaintiffs claimed a declaration that the separate property of Lady *Louisa Fitzgibbon* vested in her or any other person or persons in trust for her was chargeable with the payment of the said sums of £2012 and £5000 and interest; and claimed consequential relief.

The statement of defence denied that Lady *Louisa Fitzgibbon* was entitled to any separate property except the £15,000, which was not yet payable, and said that it was doubtful whether the assets of the Countess of *Clare* would be sufficient for the payment of the £15,000, and that the interest of Lady *Louisa Fitzgibbon* in the £15,000 was subject to other specified charges created by her.

Mr. *Fitzgibbon* died before the action was tried.

Higgins, Q.C., and *Begg*, for the Plaintiffs:—

The charge is, until judgment, a mere floating charge, and leaves Lady *Louisa Fitzgibbon* at liberty to deal with the property, so that the Plaintiffs must bring their action. The Plaintiffs ask for judgment in the form of the decree in *Picard* v. *Hine* (1). A married woman's covenant binds her separate estate: *Mayd* v. *Field* (2); *Murray* v. *Barlee* (3); *Tullett* v. *Armstrong* (4). The Plaintiffs can take whatever separate estate the Defendant has at the time of the judgment: *Johnson* v. *Gallagher* (5); *National Provincial Bank* v. *Thomas* (6); *Butler* v. *Cumpston* (7).

Glasse, Q.C., and *Townsend*, for Lady *Louisa Fitzgibbon*:—

A married woman's covenant only affects what she has at the

(1) Law Rep. 5 Ch. 274.
(2) 3 Ch. D. 587.
(3) 3 My. & K. 209.
(4) 4 Beav. 319.
(5) 3 D. F. & J. 494.
(6) 24 W. R. 1013.
(7) Law Rep. 7 Eq. 16.

time when she gives it, not what she acquires afterwards; in no case has that been done. She has now no separate estate which she had at the time when she executed the covenant: *Bromley* v. *Norton* (1). The doctrine applied to a man's property cannot be applied to the separate estate of a married woman, and only the property which she has at the time of the contract is liable: *Hulme* v. *Tenant* (2); *Davies* v. *Jenkins* (3); *Owens* v. *Dickenson* (4). In no case has after-acquired property been held liable.

W. Barber, for the trustees.

MALINS, V.C., after stating the facts of the case and the claim made, continued:—

Now, what was the object of making the lady join in the deed of January, 1875? It was a borrowing by the husband and wife. The wife was well known to be a lady of large fortune. Her husband, from what I have heard, had no means, or scarcely any means except those which he derived from his wife. The meaning of the lenders evidently was, that they should have the personal security of the wife as well as of the husband. They thought that the husband might possibly pay, but if the husband did not pay they thought there was a greater probability that the wife would pay, inasmuch as she had a large fortune for her own separate use, if not at that time, at all events in expectation upon the death of a person who was then somewhat aged. Clearly the intention of the parties was to have the security of the lady as well as that of the gentleman; and the intention of the lady herself was to give a security which should induce the assurance society to advance £3000 for an object then of great importance to her, namely, as I am told, sending her son out in the world. Now everybody knows that a married woman cannot bind herself by covenant so that she can be sued in a Court of Law. You cannot get at her person, but, according to the doctrine of this Court, you can get at her separate property. And the only object, therefore, of her being made a party to the deed of January, 1875, which assigns no property to which she was entitled, was to make

(1) 21 W. R. 155.
(2) 1 Bro. C. C. 16.
(3) 6 Ch. D. 728.
(4) Cr. & Ph. 48.

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her liable in the only way in which a married woman can be made liable, namely, to the extent of her separate property.

Then, as to the deed of the 17th of June, she is the only party who is liable, and, as appears by that deed, she assigned the life interest in the £15,000 to which she was entitled upon the death of Lady *Clare*. But that deed, to shew the intention of not limiting itself, as Mr. *Townsend* seemed to think, to assigning the property to which she was entitled, also contains a covenant by her that she will pay the £5000 and interest. Here, again, I ask what was the object of that covenant if the intention was to take merely an assignment of the life interest in the £15,000? The covenant was clearly inserted by the lenders for the purpose of obtaining her personal security in the manner in which alone a married woman can give a security, namely, a security which shall affect her separate estate.

I therefore take those two deeds as amounting to engagements by a married woman that she would pay these sums of money. What is the effect of that? It has long been settled beyond the limits of controversy that the general engagements of a married woman can be paid out of her separate estate. The only question is, whether the debt was contracted under such circumstances as would lead the Courts to the conclusion that it was intended to be a separate obligation or contract on the part of the wife. Mr. *Glasse* has most elaborately argued (not denying that a married woman is liable to the extent of the property which she has at the date of the contract), and Mr. *Townsend* has most elaborately argued that a married woman is only liable to pay out of the estate which she has at the time of the contract—and not the whole of that, because she has a power of alienation unimpaired and uninterrupted notwithstanding the contract—but only out of so much of the estate as she retains at the date of the judgment in the action. That proposition is, in my opinion, utterly unsustainable in the present state of the law. Mr. *Glasse* said that there was no case to the contrary, but I do not find a single case in which an opinion has been intimated that she is only liable to the extent of the property which she had at the date of the contract, and which she continued to have at the date of the judgment.

The first case worth referring to is *Hulme* v. *Tenant* (1), which decided that where a husband and wife joined in a bond, and the intention was that the separate estate of the wife should become liable, the wife was liable to pay on that bond. It was thought for many years that this liability of a married woman to pay debts out of her separate estate should be considered as a sort of appointment; but Lord *Cottenham*, in the case of *Owens* v. *Dickenson* (2), has utterly dissipated that notion. He says: "It has sometimes been treated as a disposing of the particular estate, but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid or by what means it is to be paid, and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything express in the contract, and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord *Thurlow* in *Hulme* v. *Tenant* is more correct. According to that view, the separate property of a married woman, being a creature of equity, it follows that if she has a power to deal with it she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it, and, inasmuch as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied." Nothing, therefore, can be more clear than that the general debts of a married woman must be paid out of her separate estate. But if it can be possibly made more clear it is made so by the celebrated judgment of Lord Justice *Turner* in *Johnson* v. *Gallagher* (3). Lord Justice *Turner* there says: "It has not, so far as I am aware, ever been disputed that married women may encumber their separate estates by mortgage or charge. When any question has arisen on such securities, the question has been, not on the right to create the security, but

(1) 1 Bro. C. C. 16. (2) Cr. & Ph. 48.
(3) 3 D. F. & J. 494.

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upon the circumstances under which it has been created." Then his Lordship goes on to say that the cases have established that the bonds, bills of exchange, and promissory notes of married women are payable out of their separate estates, and his Lordship says: "There has indeed been much question as to the mode in which these instruments take effect against the separate estate, a point to which I shall presently advert, but that in some mode or other they take effect against it cannot, upon the authorities, be denied." His Lordship then comments on the cases, and concludes: "The weight of authority, therefore, seems to me to be in favour of the liability. I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme sole*, is also in favour of it; and upon the whole, therefore, I have come to the conclusion that not only the bonds, bills, and promissory notes of married women, but also their general engagements may affect their separate estates, except as the *Statute of Frauds* may interfere where the separate property is real estate." His Lordship then says that the doctrine of appointment seems to be exploded, and that a Court of Equity having created the separate estate has enabled married women to contract debts in respect of it.

Now what is the broad principle upon which all these cases have proceeded? It is perfectly immaterial whether a married woman has separate estate at the time or not. If it were a necessary ingredient in the case that she should have separate property, it is perfectly clear that this lady had separate property at the time. The deed recites that the property was held to her separate use, and does not say a word about anticipation, but even if it had been to her separate use without power of anticipation, if she entered into a contract while she was restrained from anticipation and the husband died, so that the restraint from anticipation dropped, the property becomes her separate estate, and is liable to pay her debts as if originally there had been no restraint from anticipation.

Mr. *Glasse* very boldly asserted that there is no case deciding that property which a married woman had not at the date of the contract or of the debt being contracted was liable to pay the debt. I can only say that if such is the case I am very sorry that

the Courts have so entirely failed in expressing what they meant. I will take the case of *Picard* v. *Hine* (1). The woman there was living apart from her husband, but that, in my opinion, makes no difference, and she entered into a contract to buy a watchmaker's shop. There is not a word in the judgment in that case which does not fully mean that whatever property she had at the time of the contract, and whatever property she had when the contract was sought to be enforced—whether she had it originally when the contract was entered into or not is perfectly immaterial—but whatever property she had when the judgment was given was liable to her debts. The case is the same as that of a man who contracts a debt, and who after contracting the debt is just as much at liberty as he was before to alien his property, but whatever he retains at the time of the judgment remains liable and can be taken in execution. [His Lordship then read the chief parts of the judgments in the case.] The decree there related to the property which she had at the date of the judgment, irrespective of the question whether she had it at the date of the contract or when she acquired it. This is most distinctly shewn by the decree as given in the report of the case, and more fully in *Seton* on Decrees (2). There is another and more recent case which contradicts Mr. *Glasse's* assertion, that if I decide that the property which a married woman had not at the time of the contract is liable to fulfil the contract, I shall be the first Judge so to decide. That is a case of *Davies* v. *Jenkins* (3), before Vice-Chancellor *Hall* in 1877, where his Lordship gave judgment in the form of the decree in *Picard* v. *Hine*. [His Lordship then read the judgment in *Davies* v. *Jenkins*.] It is a judgment against her estate, and all the property she then had was liable under that judgment.

Then there is a decision of my own in 1868, *Butler* v. *Cumpston* (4). That was a very peculiar case and a very important one, because trustees had been induced at the request of the married woman, who had property to her separate use, to take additional shares in a company. Great loss was incurred, and I decided that the trustees having taken the shares at the request of the married woman, her separate estate to the last farthing was

(1) Law Rep. 5 Ch. 274.
(2) 4th Ed. p. 688.
(3) 6 Ch. D. 728.
(4) Law Rep. 7 Eq. 16.

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liable to indemnify them against that liability. There is another decision of my own, which is perfectly distinguishable from this case. That is the case of *Bromley* v. *Norton* (1). Mrs. *Bromley*, a married lady, lived at *Baden-Baden* for a considerable time with her husband, who was a great gambler, and was known to be so by the hotel-keeper. He ran up a bill of £400, and slunk away leaving his bill unpaid. The hotel-keeper thought that he would get paid by detaining the wife as a pawn, and she then signed a paper acknowledging the debt. She at last paid £100, or her father or somebody on her account paid £100, and I had to consider whether she was liable for the rest. I decided that no credit had been given to the wife, that the whole credit was given to the husband, that the promissory note was given under *duresse*, that the husband's estate was alone liable, and therefore the hotel-keeper lost his money—as he richly deserved. I proceeded upon the ground that credit was not given to the lady, and therefore I could not make her separate estate liable. If I had been satisfied that credit had been given to the lady instead of to the gentleman, I should have held, as in *Murray* v. *Barlee* (2), that her separate estate was liable. The decision as it was, was simply upon the fact that credit was given to the husband and not to the wife.

Therefore I am of opinion upon these authorities, as well as upon the most solid principles, that where a married woman creates an obligation upon her separate estate, it extends not only to that which she has at the time, but to that which she may in any way acquire and may have at the time when judgment is recovered, as laid down in *Johnson* v. *Gallagher* (3). The doctrine which has been contended for and elaborately argued, that you can only touch the property which a person contracting has at the time of the contract is, in my opinion, wholly unsustainable, and I must declare that all the separate property which the Defendant has at this time is liable to make good these debts, and there must be an inquiry in precisely the same terms as in *Picard* v. *Hine* (4). The inquiry will extend to property held to her separate use with a restraint against anticipation. It was always her separate property, but during the life of her husband she could

(1) 21 W. R. 155.
(2) 3 My. & K. 209.
(3) 3 D. F. & J. 494.
(4) Law Rep. 5 Ch. 274.

not alienate it. There may also be an injunction to restrain her from receiving or dealing with any property which this judgment affects.

Declare that such of the separate property of the Defendant Lady *Louisa Fitzgibbon* as was immediately before the death of her husband and at this present date is vested in her or any other person or persons in trust for her, including any separate property as to which, during coverture, she was restrained from anticipation, is chargeable with the principal moneys and interest secured by the indentures of January and June, 1875, in the pleadings mentioned, and with the Plaintiffs' costs of this action up to the death of the late Defendant *Gerald N. Fitzgibbon*, and charge the same accordingly. Take an account of what is due to the Plaintiffs for principal and interest under the said indentures, and for their costs of this action up to the death of the said late Defendant *G. N. Fitzgibbon*, such costs to be taxed. Inquiry of what the property of the said Defendant Lady *Louisa Fitzgibbon* to which she was entitled for her separate use during her coverture, and which is now vested in her or in any person in trust for her, including the property as to which she was restrained from anticipation during coverture, consists at this date and in whom it is now vested. Liberty for the Plaintiffs to apply in Chambers for the appointment of a receiver. Injunction to restrain the Defendant Lady *Louisa Fitzgibbon* from receiving and from assigning or charging any moneys or property affected by this judgment. Orders as to costs.

Solicitors for Plaintiffs: *Duffield & Bruty.*
Solicitors for Lady *Louisa Fitzgibbon*: *Beaument & Warren.*
Solicitors for Trustees: *Bray & Warren.*

V.-C. H.
1880
March 5.

In re CORBISHLEY'S TRUSTS.

Presumption of Death—Trust by Deed for Person named—Person not heard of for Seven Years—Onus Probandi.

By deed, dated in 1866, trusts of personalty were declared, after the death of the settlor, in favour of a person by name. The named person had not been heard of since 1861. There was no evidence as to the date of his death, and on the death of the settlor her representatives claimed the money, contending that there was a resulting trust in her favour:—

Held, that where a trust was declared by deed in favour of a named person, such person must, until the contrary was shewn, be taken to have been in existence at the date of the deed; that the *onus* of proving his death before that date lay on the representatives of the settlor, and as it had not been discharged by them, there was no resulting trust, and the money must be paid to the representatives of the named person.

PETITION.

By an indenture of settlement dated the 14th of November, 1866, *Penelope Corbishley* declared that the trustees therein named should stand possessed of certain funds therein specified upon trust after her death to raise (amongst other sums) the sum of £450 in trust for *Henry Corbishley* (one of the children of *Ebenezer Corbishley*) on his attaining the age of twenty-one years; and the settlor also declared that the trustees should, out of the proceeds of the sale of certain leaseholds and out of the residue of the trust funds, pay her debts and funeral and testamentary expenses, and, after payment thereof, stand possessed of the residue upon trust as to one moiety for *Ebenezer Corbishley* and his children, and as to the other moiety, for *William Corbishley* and his children.

By her will, dated in December, 1866, the settlor gave the residue of her unsettled property to one *Watson*, and appointed him her executor. The settlor died in 1877, and *Watson* having died in 1875, letters of administration with the will of the settlor annexed were granted to *Ebenezer Corbishley* in November, 1877.

Henry Corbishley attained twenty-one on the 10th of August, 1850, and in the year 1861 he left *England* for the *United States of America*. Shortly after the time at which *Henry Corbishley* would have arrived in *America*, *Ebenezer Corbishley* received by

post a *New York* newspaper, bearing the *New York* post-mark, and addressed to him in the handwriting of *Henry Corbishley*. Since that time nothing had been ever heard of *Henry Corbishley*, although inquiries had been duly made.

The trustees of the settlement paid into Court under the *Trustee Relief Act* the sum of £450 directed to be raised upon trust for *Henry Corbishley* as aforesaid.

Harry Greenwood, for the Petitioner:—

Henry Corbishley must be presumed to be dead at the expiration of seven years after he was last heard of, and the *onus* of proving that he survived to any particular time after the date of his disappearance lies on those who claim under him. His representatives must therefore prove that he survived the 14th of November, 1866, the date of the settlement, and if they cannot prove this by affirmative evidence, there is a resulting trust in favour of the settlor: *In re Phené's Trusts* (1); *In re Lewes' Trusts* (2).

[HALL, V.C.:—This is a case, not of a will, but of a settlement; and the trust is declared, not in favour of a legatee who may die in the lifetime of the testator, but of a person named in the deed, so that the trust remains until it is got rid of. If administration had been taken out to *Henry Corbishley*, and his legal personal representative had sued for this sum, I do not see what answer there would have been to his suit.]

The representative would have had to prove his title. The presumption, in the absence of evidence is rather in favour of death early in the period of seven years than towards the close of it: *Hickman* v. *Upsall* (3). Here the settlement was dated within the last two years of the period.

[He also cited *Doe* v. *Nepean* (4).]

MacSwinny, for the trustees of the settlement, and

H. J. Tweedie, for the next of kin of *Henry Corbishley*, were not called on.

(1) Law Rep. 5 Ch. 139.
(2) Ibid. 6 Ch. 356.
(3) Law Rep. 20 Eq. 136; 4 Ch. D. 144.
(4) 2 M. & W. 894.

V.-C. H. 1880 *In re* CORBISHLEY'S TRUSTS.

HALL, V.C.:—

I think that the argument which has been addressed to me with regard to this fund is based upon a misapprehension of the principle and effect of the decisions referred to as applied to a case such as that before the Court. The case before the Court is that of a settlement containing a trust for a person named, who must, therefore, until the contrary is shewn, be taken to have been in existence at the date of the settlement. That trust being so created, the representative of that person (he being dead) is entitled to the benefit of that trust until those who say that the trust failed altogether, prove such failure by affirmative evidence. That affirmative evidence ought to be proof that the *cestui que trust*, though named in the instrument, was in fact dead at the date of it, so that the trust failed altogether, and there was a resulting trust for the settlor. Those who rely on that title must make out the fact which is the only foundation of their title. So far from the authorities referred to favouring the Petitioner's contention they seem to me to go directly the other way. If the claim was now made on behalf of the person assumed to be dead, and representation had been taken out to him, and there was no actual evidence to shew when he died, the personal representative in support of his claim would merely say, "I am the representative of this *cestui que trust*; the money belonged to him when he was alive; he is dead, and it now, therefore, belongs to me; there is nothing more for me to do; I have not to prove that he was alive at the date of the settlement; a trust was created for the person I represent, my title is clear without further proof, and those who seek to displace that title must produce the evidence necessary to displace it." The affirmative evidence, therefore, corresponding in this case with that which is deemed requisite in the cases which have been referred to, would be evidence on the part of the persons affirmatively asserting, contrary to the title under the deed, that the person named did not take under it, because he was not alive at the time when it was executed; and on behalf of their title, which depends on that state of things, they must make that out by affirmative evidence. The *onus* is on them; they do not discharge that *onus*, and they do not, therefore, get rid of the title created by the instrument in

favour of the *cestui que trust* therein named. It seems to me, therefore, that I cannot treat this fund as being the subject of a resulting trust, and so forming part of the estate of the settlor. The order must accordingly be for payment of the fund to the legal personal representative of *H. Corbishley* when constituted.

V.-C. H. 1880 *In re* CORBISHLEY'S TRUSTS.

Solicitors for all parties: *A. Calkin Lewis.*

BUSTROS *v.* BUSTROS.

V.-C. H. 1880 *April* 9.

[1880 B. 200.]

Practice—Notice of Writ in lieu of Service out of the Jurisdiction—Affidavit of Service of—Form of—Rules of Court, 1875, *Orders* II., *rr.* 4, 5; IV., *r.* 1; XI., *rr.* 3, 5.

Where leave had been obtained to serve notice of the writ in lieu of service out of the jurisdiction, upon a Defendant who was a Syrian resident at *Beyrout*:—

Held, that an affidavit of service in the form adopted in the Common Law Divisions was sufficient.

THE Defendant in this action was a Syrian resident at *Beyrout*, and the Plaintiff had obtained, under Rules of Court, 1875, Orders II., rule 4, and XI., rules 1, 3, and 5, leave to serve him with notice of the writ in lieu of service out of the jurisdiction. A difficulty having arisen as to the form of the affidavit of the service of this notice,

Romer, for the Plaintiff, stated that there was a difference in the forms of the affidavits of service adopted in the Chancery and Common Law Divisions. According to the form adopted in the Chancery Division, the person who effected the service was required to depose that he had personally served the Defendant "with a notice of the writ of summons in this action, which appeared to me to have been regularly issued out of the Chancery Division of this Honourable Court," and that "at the time of the service of such notice in manner aforesaid, memoranda were subscribed to the said writ, and endorsements were made thereon and

V.-C. H. 1880 BUSTROS v. BUSTROS.

on the said notice in the manner and form prescribed by the rules of the Supreme Court." According to the form in use in the Common Law Divisions, the deponent merely swore that he had personally served the Defendant "with a notice in writing, a true copy of which is hereunto annexed," and a true copy of the notice was annexed to or scheduled in the affidavit. The advantage of the latter form was obvious, for it would be difficult, if not impossible, to find a person in *Syria* who could make such a deposition as was required by the Chancery form, while it would cause great and needless expense to send out a person from this country on purpose. The officials in the Chancery Division would not, however, accept an affidavit in the Common Law form without the express direction of the Judge, and he now applied for such direction accordingly, referring to the Rules of Court, 1875, Orders II., rules 4 and 5, IV., rule 1, and XI., rules 3 and 5.

HALL, V.C.:—

The difference between the two forms appears to be that the one describes the notice, whilst the other sets out a copy of it. I do not see why an affidavit that a person served a document, a copy of which is set forth in the affidavit, should not be at least as good, if not better, than an affidavit which describes the kind of document which was served. Therefore, without saying that the Chancery form will not do, I shall adopt the Common Law form, and state that I consider it sufficient.

Solicitors: *Hollams, Son & Coward.*

In re JACKSON AND OAKSHOTT.

V.-C. H.
1880
June 5.

Vendor and Purchaser—Sale of Leasehold Property by Mortgagee under Power—Conditions of Sale—Requisitions—Subsequent Disclosure of Equitable Mortgage—Rescission of Contract—Vendor and Purchaser Act, 1874.

At a sale by auction of leasehold property by a mortgagee under a power one condition of sale was that within the time limited from the delivery of the abstract the purchaser should send to the vendor's solicitors his requisitions on the title or evidence, and in default of any he should be deemed to have accepted the title, and for the purpose of requisitions the abstract was to be deemed to be perfect if it supplied the information suggesting the same, and if the purchaser should insist on any requisition which the vendor should be unable or should decline to comply with, he should be at liberty to rescind the contract. An abstract was delivered, but it did not shew the real state of the title. After requisitions were sent and replies received, the purchasers' solicitors were informed by mortgagees that the property had been mortgaged by deposit of an underlease to them. The vendor, who was not aware of the mortgage, was required to pay the amount due to the mortgagee, but his reply was that he was unable and unwilling to satisfy the claim, and that he would rescind the contract. The purchasers insisted on the mortgage being discharged, and upon a summons under the *Vendor and Purchaser Act*, 1874, a declaration was made that the vendor was not entitled under the condition and circumstances to rescind.

THIS was a summons under the *Vendor and Purchaser Act*, 1874.

On the 16th of October, 1879, certain property situate in *New Street, Birmingham*, held for the remainder of a term of which four years were unexpired, was sold by *Jackson* by auction, for £860, to *Oakshott* and *Guthrie*. The conditions of sale, with which were incorporated the common form conditions of the *Birmingham Law Society*, provided that objections and requisitions to and on the title should be sent within fourteen days from the delivery of the abstract.

The 8th of the latter conditions was:—"That within the time limited by the conditions of sale the purchaser shall send to the vendor's solicitor a statement in writing specifying the objections and requisitions (if any) to or in respect of the title or the evidence thereof which the purchaser may be entitled to make consistently with these conditions, and the conditions of sale, and in default of such objections or requisitions (if none), and subject

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only to such (if any), he shall be deemed to have accepted the title, and time shall in this respect be considered as of the essence of the contract, and for the purpose of any objection or requisition an abstract shall be deemed to be perfect if it supply the information suggesting the same although otherwise defective, and if the purchaser shall insist on any objection or requisition (not being a claim for compensation falling within the 9th of these conditions) which the vendor shall be unable, or on the ground of expense shall decline to remove or comply with, the vendor shall, notwithstanding any intermediate or pending negotiation, or any litigation which the purchaser may have commenced, or any attempt to remove or comply with such objection or requisition, be at liberty by notice in writing signed by him, or his solicitor, and delivered to the purchaser or his solicitor, to rescind the contract with such purchaser unless within ten days after delivery of such notice the purchaser shall by notice in writing withdraw such objection or requisition, and upon such rescission the purchaser shall be entitled to receive back his deposit money, but without interest."

The 9th condition made provision for compensation in the event of any error, misstatement, or omission in the description of the property being discovered and pointed out before completion. The vendor delivered an abstract of title which shewed that there had been a grant of an underlease in 1846 to *James Jackson*, and that there was on the 25th of September, 1862, an assignment of the superior lease "to the said *James Jackson*," but, in fact, the latter was the son of the before-mentioned *James Jackson*, so that the underlease was not merged, but the abstract contained nothing to shew this, and the vendor was not aware of it. As a matter of fact the younger *James Jackson* was in 1862 beneficially entitled to the underlease, subject to an equitable mortgage, and in 1862 he mortgaged the property to the present vendor, who sold it under a power of sale. The purchasers' solicitors sent requisitions on the abstract, and received replies, after which they, on the 20th of November, received a letter from the solicitors of the parties entitled to the equitable mortgage of the underlease, stating that there was due thereon £780 and some interest, and disputing the vendor's right to sell. The purchasers' solicitors thereupon required the vendor's solicitors (who had been about

the same time communicated with by the mortgagees' solicitors) to get rid of the incumbrance (if any).

On the 25th of February the vendor's solicitors wrote saying that they were unable to complete the contract, and sent a formal notice stating that the vendor was unable, and unwilling on the ground of expense, to satisfy the mortgagees' claim, and was unable to comply with another outstanding requisition, and that the vendor would rescind the contract unless these two objections were withdrawn within ten days. The latter objection was thereupon withdrawn by the purchasers' solicitors, but they insisted on the mortgage being discharged, refused to admit the rescission, and took out the present summons for a declaration that the vendor was not entitled to rescind. While the summons was pending the claim of the mortgagees, whose security the vendor's solicitors had, before giving the notice to rescind, ascertained to be valid, was settled by them for £400 and paid off.

O. L. Clare, for the purchasers:—

The requisition as to the incumbrance on the underlease is a question of conveyance and not of title, and the 8th condition giving power to rescind does not apply to matters of conveyance merely: *Greaves* v. *Wilson* (1). The requisition in question, even if a matter of title, was strictly out of time, and therefore not a requisition within the purview of the 8th condition at all. The vendor should have declined to consider it, and should have insisted on specific performance. The purchasers have no necessity now to insist upon it, as the incumbrance has in fact been discharged by the vendor: assuming that the condition applies in terms, then it is submitted that under the circumstances the vendor cannot avail himself of it to evade an honest liability.

[He also referred to *Pryse* v. *Macaulay* (2).]

W. Barber, for the vendor:—

The condition, looking at all parts of it, applied not only to requisitions upon the title, but to requisitions of all sorts, and the 9th condition was one of conveyance. Whether the objection or requisition was made within the time limited by the condition or made

(1) 25 Beav. 290, 294, 296. (2) 2 D. M. & G. 339.

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afterwards, if it was one with which the vendor was unable or unwilling to comply with, he had a perfect right to rescind the contract. The vendor acted strictly within the terms of his contract, and the decision in *Greaves* v. *Wilson* (1) is not a binding authority in a case of this kind.

HALL, V.C.:—

I am of opinion that the notice to rescind was not properly given. It appears to me that under the circumstances of the case the vendor had no right given him by the 8th condition to rescind. The abstract of title delivered by the vendor's solicitors did not disclose any serious existing objection to the title, *i.e.*, it did not shew that the property was subject to a considerable burden or charge. If the purchasers had thought fit to complete upon the title shewn after having read the communication which was made to them by the incumbrancer, when he heard of the sale, they would have got the property subject to the burden mentioned. It is not necessary for me to say whether under those circumstances they might or might not have had, notwithstanding the conditions, a right to proceed against the vendor in respect of the charge. However that may be, it appears that upon the abstract which was delivered, and, as matters stood, it could not be made the subject of any requisition under the 8th condition, and not being capable of being inquired into, it is clear to me that it is not within that condition. Mr. *Barber* submitted that the second part of the 8th condition is wider in scope than the first part of it; that it relates to requisitions and objections generally, and is not confined to those which might be made within the first part of it. I do not agree with him in that construction of the condition. The condition provides in the earlier part that requisitions and objections shall be sent to the vendor's solicitors within a specified time. [His Lordship read the 8th condition down to the words "otherwise defective."] Now, confessedly, in this case a most imperfect abstract was delivered to the purchasers' solicitors, as it did not disclose the burden on the property. The condition goes on, "And if the purchaser shall insist" . . . .

(1) 25 Beav. 290.

[His Lordship read the second part of the condition down to the words "rescind the contract" . . . . .] The word "and" shews that it refers to the earlier part of the condition, and the word "insist" points to the same conclusion. It is not making an objection, but there being an objection made, they insist upon it. It is clear to my mind that the second part of the condition has no application except where the case comes within the earlier part of it. Mr. *Barber* submitted further that the construction was otherwise by reason of the express exclusion of cases coming under the 9th condition: but that is not so, for there might be some cases within that condition which would not come under the earlier part of the 8th condition. The notice to rescind was given by the vendor, and it having been given the contract was to be rescinded unless the purchasers should within ten days withdraw the objection or requisition. That is to say, the notice to rescind was a sort of conditional notice which brought the case within the observations which were made in *Greaves* v. *Wilson* (1), where the learned Judge said, "The plaintiff was not, in my opinion, entitled to give notice to rescind the contract at the time when he did without saying more as to the title or requisitions. He never retracted in the slightest degree or said, 'if you waive this or that I will not insist on putting this condition of sale into operation.'" In this case that is present which was wanting in *Greaves* v. *Wilson*, viz., an express provision to give the purchaser an opportunity of withdrawing the objection or requisition objected to. For the reasons which I have stated, I think the case is outside the 8th condition, and the whole matter is brought to this position: there was a sale by the vendor, who offered his property under a *bonâ fide* belief that there was not any charge upon it; but it turns out that there was a charge: and under such circumstances the ordinary rule is that the purchaser is entitled to have the charge cleared off out of the purchase-money, it being sufficient for the purpose. There seems to have been a great desire to prevent the purchasers from getting rid of the charge themselves, which, however, the vendor has since paid off. Perhaps the vendor's course of action is to be accounted for by his having wanted to pay off the charge himself, and to take advantage of the condition which

(1) 25 Beav. 295.

V.-C. H. 1880 *In re* JACKSON AND OAKSHOTT.

enabled him to rescind. Under the circumstances there is no hardship which should upon equitable grounds excuse the vendor from carrying out the contract. The application upon the summons must be allowed with costs.

Solicitors: *Gamlen & Son*, agents for *Cottrell & Son, Birmingham*; *Brook & Chapman*, agents for *Goffey & North, Liverpool.*

V.-C. H. 1880 *June* 8.

In re LANE. LUARD *v.* LANE.

[1877 L. 252.]

Will—Specific Legacy—Ademption—Gift of "My Debentures"—Debenture Stock.

A testator having certain debentures at the date of his will, thereby gave "all my debentures" upon certain trusts. After the date of the will the testator exercised an option given him by the company who had issued the debentures, and converted them into debenture stock of the same company:—*Held*, that the debenture stock did not pass by the will.

C. B. LANE, by his will, dated in 1873, bequeathed to his wife, *E. H. Lane*, "all my debentures in the *San Paulo Brazilian Railway Company*." At the date of the will the testator had ten of the company's debentures of £100 each, bearing interest at £5 per cent. per annum. After the date of the will the money secured by these debentures became payable, and the company not being willing to renew the debentures offered the testator the option of converting them into an equivalent amount of permanent £5 10*s.* per cent. debenture stock. The testator exercised this option, and took the debenture stock, which amounted to £930, and at the time of his death, in January, 1877, there was standing in his name in the books of the company the £930 debenture stock of the *San Paulo Brazilian Railway Company* which he had thus taken.

This was an action by the executors of the will to administer the estate of the testator, and the principal question argued was whether the debenture stock passed under the gift of the debentures.

James Kaye, for the Plaintiffs, referred to *Macdonald* v. *Irvine* (1).

Freeling, for Mrs. *E. H. Lane*, the widow of the testator:—

The debenture stock is the same thing as the debentures, only in another form; and if in reality the subject of the gift exists, though in a somewhat different shape, there is no ademption: *Le Grice* v. *Finch* (2); *Morgan* v. *Thomas* (3).

In *Oakes* v. *Oakes* (4) a bequest of "all my *Great Western Railway* shares" was held to pass shares in the *Great Western Railway Company* which the testator had at the time of his will, but which were before his death, by a resolution of the company, converted into consolidated stock. In that case Vice-Chancellor *Turner* said, "The testator had this property at the time he made his will, and it has since been changed in name or form only. The question is whether a testator has at the time of his death the same thing existing, it may be in a different shape—yet substantially the same thing."

Again, in *Morrice* v. *Aylmer* (5), which was affirmed by the House of Lords (6), it was held that a bequest of railway shares will carry railway stock; and why should not a bequest of debentures carry debenture stock? Again, in *In re Pilkington* (7), where railway bonds specifically bequeathed were afterwards converted into shares by a general arrangement with the bondholders, it was held that there had been no ademption; and the same principles were followed in *Jenkins* v. *Jones* (8), in which "farming stock" had been converted into money.

In *Macdonald* v. *Irvine* the testator had himself sold the "Egyptian nine per cent. bonds" and had purchased different bonds called "Khedive bonds" with the purchase-moneys, so it was not substantially the same thing.

Holland, for *Anne Harriet Lane*, a legatee interested in the residue:—

This is a clear case of ademption. In *Le Grice* v. *Finch* the

(1) 8 Ch. D. 101.
(2) 3 Mer. 50.
(3) 6 Ch. D. 176.
(4) 9 Hare, 666, 672.
(5) Law Rep. 10 Ch. 148.
(6) Ibid. 7 H. L. 717.
(7) 6 N. R. 246.
(8) Law Rep. 2 Eq. 323.

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In re LANE. LUARD *v.* LANE.

legacy was a demonstrable legacy of "the £500 we have now out on mortgage."

[HALL, V.C.:—That case is distinguishable on other grounds also, and has, besides, been lately disapproved. Direct your argument to the question whether the reasoning in *Oakes* v. *Oakes* (1) applies, *i.e.*, whether the debenture stock is substantially the same thing as the debentures.]

They are essentially different: one is a debt secured by a mortgage, in the case of the other the stockholder has no means of recovering his principal. The case is precisely the same as if the money secured by the debentures had been repaid to the testator, and had been invested by him in the purchase of other securities. The debenture stock was a new thing of a different character from the debentures which the testator formerly had. The judgment of Lord Justice *James* in *Attree* v. *Hawe* (2) shews the distinction between debentures and debenture stock.

Methold, for another person interested in the residue.

HALL, V.C.:—

I do not think that *Oakes* v. *Oakes* governs this case. It appears to me that this will is not sufficient to pass the new thing which the testator acquired and which he took in exercise of his option instead of the thing which he had bequeathed by his will. I hold it to be a substantially different thing from that which he gave, and that it does not answer the description contained in the will.

Solicitors: *Markby, Tarry, & Stewart.*

(1) 9 Hare, 666. (2) 9 Ch. D. 349.

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[1878 H. 40.]

Company—Debenture-holder—Deferred Security—Winding-up—Maturing of Security.

A company borrowed money upon the security of debentures, each of which contained a covenant with the holder to pay the principal at a future date with interest in the meantime, an assignment to the holder of all the stock chattels and effects which might from time to time be held by the company, and a charge of the same as security for the repayment of principal and interest, with a proviso that until default in payment of principal or interest for twenty-one days after the same respectively ought to be paid the company might receive and apply all its assets for its own purposes. Before the principal money became due or the interest had fallen into arrear, the company went into liquidation :—

Held, that the moment the winding-up commenced the money secured by the debentures became payable, and the debenture a security enforceable upon all the assets of the company as they existed at the date of the winding-up.

THE Plaintiff in this action was the holder of one of the company's debentures for £100.

These debentures were issued in April, 1877, and each of them took the form of a covenant with the holder to pay to him the principal sum of £100 on the 9th of April, 1882, with interest in the meantime at £10 half-yearly on the 9th of October and the 9th of April in every year, the first half-yearly payment to be on the 9th of October, 1877; and they each comprised an assignment by the company to the holder of "all the stock, plant, chattels, and effects which may from time to time be held by the company, and all the title and interest of the company therein," as security for the repayment of the principal moneys and interest, with a proviso that until default should be made in payment of the principal moneys thereby secured, or the interest thereon, or any portion thereof respectively for twenty-one days after the same ought to be paid, the company should be at liberty "to receive and apply for the purposes of the company all and any assets of the company," including any calls that might have been made and were due to the company; and in case of such default

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the debenture-holder was empowered to enter and sell the property which was the subject of the security.

The interest which accrued due on the 9th of October, 1877, was duly paid; but on the 2nd of December, 1877, a petition was presented to wind up the company, and on the 10th of January following a provisional liquidator was appointed who took possession of the company's property.

On the 24th of January, 1878, the company passed a resolution for a voluntary winding-up, and on the 19th of July, 1878, the voluntary winding-up was ordered to be continued under the supervision of the Court.

The present action was commenced by the Plaintiff on behalf of himself and all other the debenture-holders of the company on the day on which the resolution for a voluntary winding-up was passed; and in it the Plaintiff claimed a declaration that he and the other debenture-holders were entitled to an equitable charge on the whole of the property and effects of the company, including the uncalled-up capital, and a receiver.

On the 2nd of August, 1878, leave was given by the Court to continue the action, and under a reference to Chambers a receiver was afterwards appointed.

Hastings, Q.C., and *Bradford*, for the Plaintiff:—

The Plaintiff and the other debenture holders are entitled by virtue of their security to a charge upon the real and personal estate of the company as it existed at the date of the winding-up, *i.e.*, in this case, on the entire assets as they existed on the 24th of January, 1878, when the resolution for a voluntary winding-up was passed: *In re Colonial Trust Corporations* (M. R., Dec. 13th, 1879). It will be said that the principal moneys secured by the debentures were not payable until 1882, and that at the time of the winding-up neither principal nor interest was due and payable. But the moment a company comes to be wound up, and its property has to be realised, the debenture holders can realise their security whether principal or interest is actually payable or not. This was held in *In re Panama, New Zealand, and Australian Royal Mail Company* (1), where the debenture holders' charge was only

(1) Law Rep. 5 Ch. 318.

on the undertaking and all sums of money arising therefrom; *In re Marine Mansions Company* (1) supports the same view. If this were not so, the liquidator might, while the debenture-holders were waiting for their security to mature, dispose before their eyes of the entire assets which constituted their security.

W. Pearson, Q.C., and *Burton Buckley*, for the liquidator:—

The important question is, at what point of time do the debentures take effect on the property of the company, and this depends on the form of the debenture. Here there was no immediate charge and nothing actually due upon the debenture either for principal or interest at the date of the winding-up; and this distinguishes the present case from either of those cited. This debenture did not take effect as a charge until the 30th of April, or twenty-one days after the 9th of April, when the first unpaid interest became due. There is, moreover, in every one of these debentures a special clause under which the company may, until default, apply the whole assets for their own purposes; and if the debenture-holders could claim anything at all, it would be subject to a discount deduction. The true principle with regard to deferred securities is, that the holder must either come in under the liquidation, in which case he must throw up his security, proceed under sect. 158 of the *Companies Act* of 1862 (under which all debts and claims mature for the purpose of proof) to have his debt valued, and prove for the amount, which would be subject to discount; or if he chooses to hold to his security, he must abide by its terms as to the time of payment, and remain outside the liquidation, leaving the liquidator to deal with the assets meanwhile.

HALL, V.C.:—

The argument which has been addressed to me on behalf of the Defendants seems to involve this, that where a company becomes insolvent, and has to be wound up, a person who has a security from the company on property described as "chattels and effects which may from time to time be held by the company," is to allow the official liquidator to go on dealing with the assets of the

(1) Law Rep. 4 Eq. 601.

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company as if the company had not been wound up at all, and applying that property for the benefit of the ordinary creditors of the company, thus, of course, in process of time wiping out the security altogether. That really is the practical effect of the argument which has been addressed to me. It seems to me that this cannot be so. We have here a debenture which is in form an assignment of "all the stock, plant, chattels, and effects which may from time to time be held by the company," and we have all that property charged as a security, subject to this, that in a certain particular state of circumstances the company is to be at liberty "to receive and apply for the purposes of the company all and any assets of the company," including any calls that have been made, and are due to the company. But it seems to me that the clause on which the liquidator relies is one which contemplates and is addressed to a continuance of the company, and does not apply to the state of circumstances which has arisen, of there being a winding-up; and I therefore treat this clause as inapplicable. The argument is that such a debenture-holder as the present must wait; he may get paid, according to the terms of his debenture, his interest on certain half-yearly days, and the capital in two or three years—it might have been in ten years, or in any other given number of years from the date of his debenture—but that being so he is to wait for payment unless he chooses to take the course which it has been suggested he might, of throwing up his security altogether, or having his security valued, discounting in some way the payment which he is to receive. It appears to me that, when a company comes to be wound up, the arrangement for the continuance of the loan for a certain time necessarily comes to an end—the money becomes immediately payable, and the security immediately enforceable. I agree that the particular circumstances are probably not exactly the same in the case now before the Court as in the case which has been cited of *In re Panama, New Zealand, and Australian Royal Mail Company;* but I cannot help thinking that the observation of Lord Justice *Gifford* where he says that (1) "the moment the company comes to be wound up, and the property has to be realized, that moment the rights of these parties beyond

(1) Law Rep. 5 Ch. 322.

all question attach," must be treated as applicable to the case now before the Court, and acting upon and following that, I think I ought to hold that the property of the company, as it existed when the winding-up took place (which is the same day that the present action was commenced), must as from that time be taken to have been subject to and properly applicable for the payment to the debenture holders of what was then due, instead of being left, as it might have been in this particular case, for a considerable time, to be dealt with and applied by the liquidator to the detriment, and possibly the entire extinction of the security of the debenture holders.

Solicitors for Plaintiff: *Wild, Browne, & Wild.*
Solicitor for Company: *F. Bradley.*

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June 27, 28, 29, 30; *May* 7.

THOMAS *v.* WILLIAMS.

[1879 T. 123.]

Libel injurious to Trade—Injunction—Jurisdiction—Right to Trial by Jury—Proof of actual Damage—Fox's Act (32 *Geo.* 3, *c.* 60)—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Court*, 1875, *Order* XXXVI. *r.* 3.

The Court has now jurisdiction to restrain by injunction the publication of a libel injurious to trade.

In order to obtain an injunction in such a case it is sufficient for the Plaintiff to shew that the libel is calculated to injure his trade; it is not necessary that he should prove actual damage.

The Defendant in a civil action for libel has the same right to a trial by jury as the Defendant in any other civil action; he has no higher right.

Fox's Act (32 Geo. 3, c. 60) does not apply to a civil action for libel.

THIS action was brought to restrain the issue by the Defendants of some trade circulars, which the Plaintiff alleged to be libellous and injurious to his trade, and for damages.

The Plaintiff, *Henry Thomas*, was a manufacturer of needles at *Redditch*, and carried on his business under the firm of *S. Thomas & Sons*. The business had been established for many years, and had been founded by his father, *Samuel Thomas*. The needles manufactured by the firm were sold in large quantities in the Australian market. In the year 1856 the Plaintiffs' firm acquired the business of one *George Holyoake*, a needle manufacturer of great reputation, and had ever since sold some of their needles under the name of *George Holyoake*, though they did not describe their firm by that name.

There was another firm of needle manufacturers called *J. Thomas & Sons*, whose needles were also sold in the Australian market. There was also a Mr. *Edmund Holyoake*, who carried on business as a needle manufacturer under the firm of *T. & J. Holyoake*. That business had formerly been carried on by *Thomas* and *Joseph Holyoake*, who were brothers of *George Holyoake*, the three being

sons of one *Joseph Holyoake*, a needle manufacturer, who died about the year 1817.

Among the needles which the Plaintiffs' firm supplied for the Australian market were needles known in that market under the following descriptions:—

"*S. Thomas & Sons*' *Victoria* Drilled Eyes, at 4*s.* 6*d.* per 1000.
"*S. Thomas & Sons*' Warranted Drilled Eyes, at 4*s.* per 1000.
"*George Holyoake's* Original Diamond, at 4*s.* per 1000.
"*Holyoake's* Original *Whitechapel* Needles, at 3*s.* 6*d.* per 1000."

The "*Victoria* Drilled Eyes" were supplied by the Plaintiff's firm under the different technical descriptions of "Sharps," "Betweens," "Ground Downs," "Straws," and "Blunts."

The Plaintiff's firm did not, however, claim any right to the exclusive use of the names "*Thomas*" and "*Holyoake*," or to interfere with the use of those names by other manufacturers of needles, provided that they were used without attempting to appropriate the reputation of the Plaintiff's firm.

The Defendants, *David Williams & Newton*, carried on business in *London* as dealers in small wares (including needles) for exportation to *Australia* and elsewhere. In February, 1879, they had made arrangements with the firm of *J. Thomas & Sons*, and with *Edmund Holyoake*, for a supply of the needles of those two firms for exportation to *Australia*, and they then issued, and distributed in the Australian market, the following circular:—

"Dear Sir,—Knowing the number of spurious makes of needles extant, we have made arrangements with the original firm of *Thomas*, the original and only manufacturers of the name of *Holyoake*, and the well-known firm of *J. Millward & Co.* (who have been established since the commencement of the century) to represent their manufactures in the export trade, and at foot we beg to hand you prices with full trade discounts, thus placing you in the same position as if your orders were given direct, and upon exactly the same terms as the wholesale houses are supplied here.

"Soliciting your orders, to which we can promise the prompt and careful attention of our friends,

"We are yours respectfully,
(Signed) "*David Williams & Newton.*"

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	"Per Thousand. s.	d.	Discount.
"*J. Thomas & Sons' Victoria* Drilled Eyes, in Sharps, Betweens, Ground Downs, Straws, Blunts, and Darners	4	6	12½ per cent.
J. Thomas & Sons' Warranted Drilled Eyes	4	0	12½ „
J. Millward & Co.'s Victoria Patent Wrapped	4	0	10 „
J. Millward & Co.'s Egg Eyes	5	0	10 „
J. Millward & Co.'s Bevel Eyed, in registered case	6	6	15 „
Holyoake's Original *Whitechapel* Needles Labels 36 or 37 . .	3	6	15 „
Holyoake's Original Diamond Labels 261 or 261c	4	6	15 „

"Usual terms.

"February 6th, 1879."

The Plaintiff claimed an injunction to restrain the issue of this circular, and of two other circulars which the Defendants had issued.

This was the trial of the action.

Cookson, Q.C., and *W. Phipson Beale*, for the Plaintiff.

Kay, Q.C., and *MacSwinney*, for the Defendants:—

The Court has no jurisdiction to restrain the publication of a libel: *Prudential Assurance Company* v. *Knott* (1). At any rate it will not do so until the question of libel has been determined by a jury: *Saxby* v. *Easterbrook* (2). *Fox's Act*, 32 Geo. 3, c. 60, gives the Defendant in an action for libel the right to have the question of libel determined by a jury.

[FRY, J., referred to sect. 25, sub-sect. 8, of the *Judicature Act*, 1873.]

That provision has not enlarged the power of the Court as to

(1) Law Rep. 10 Ch. 142. (2) 3 C. P. D. 339.

granting injunctions, or altered the principles on which it acts in so doing: *Day* v. *Brownrigg* (1); *Gaskin* v. *Balls* (2).

[FRY, J.:—In *Beddow* v. *Beddow* (3) *Jessel*, M.R., appears to have thought that the power of granting injunctions has been enlarged by the *Judicature Act*.]

His decision only went to this extent, that the Chancery Division has now the same power of granting injunctions which was given to the Courts of Common Law by sect. 79 of the *Common Law Procedure Act*, 1854.

[FRY, J., referred to *James* v. *James* (4).]

At any rate the Plaintiffs are bound to prove special damage to their trade: *Malachy* v. *Soper* (5); and this they have not done.

Cookson in reply:—

In this very case the Master of the Rolls granted an interlocutory injunction, so that he must have thought the Court had jurisdiction.

Fox's Act was a merely declaratory Act: *Hallam's* Constitutional History of England (6); *Baylis* v. *Lawrence* (7); *Parmiter* v. *Coupland* (8). *Fox's Act* did not take away from the Court the power of deciding whether certain words are *per se* libellous or not: *Reeves* v. *Templar* (9); *Fray* v. *Fray* (10). The Court has now full power to stop the circulation of defamatory matter. The only reason why it formerly refused to restrain the publication of a libel was that there was a remedy at law, and it would not act before the legal right had been established: *Clark* v. *Freeman* (11). In *Prudential Assurance Company* v. *Knott* (12) the application was for an interlocutory injunction. Moreover, that case was before the *Judicature Act* had come into operation. That Act, though it has not altered the principles upon which the Court acts in granting injunctions, has very much enlarged its power of granting

(1) 10 Ch. D. 294.
(2) 13 Ch. D. 324.
(3) 9 Ch. D. 89.
(4) Law Rep. 13 Eq. 421.
(5) 3 Bing. N. C. 371.
(6) 3rd Ed. vol. iii. p. 230.
(7) 11 A. & E. 920, 924.
(8) 6 M. & W. 105, 108.
(9) 2 Jur. 137.
(10) 17 C. B. (N.S.) 603.
(11) 11 Beav. 112.
(12) Law Rep. 10 Ch. 142.

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them: *Beddow* v. *Beddow* (1); *Day* v. *Brownrigg* (2). Though the Act has not created new causes of action, the power of granting injunctions is extended to actions in which it did not previously exist. In *Thorley's Cattle Food Company* v. *Massam*, Vice-Chancellor *Malins* at the trial granted the injunction which he had refused to grant on an interlocutory motion, and his decision has been affirmed by the Court of Appeal (3). If the Defendants wished to have the action tried by a jury they should have given notice to that effect under rule 3 of Order XXXVI. It is too late to raise the objection after the evidence on both sides has been closed: *Ex parte Swinbanks* (4).

Kay, in reply as to the new cases cited in reply:—

In *Parmiter* v. *Coupland* (5) it was held that the Judge ought to have told the jury to determine whether the particular publication in question was a libel. In *Reeves* v. *Templar* (6) the only question, which was raised on demurrer, was whether the Court was not entitled to say that there was nothing to go to a jury. In *Clark* v. *Freeman* (7) Lord *Langdale* distinctly laid it down that the Court had no jurisdiction to restrain the publication of a libel. The judgment of the Master of the Rolls in *Beddow* v. *Beddow* (8) supports my argument that the *Judicature Act* has not conferred the jurisdiction. And, if the Court cannot without a jury determine whether a publication is a libel, it cannot be "just or convenient" to grant an injunction to restrain a publication on the ground that it is a libel.

May 7. FRY, J.:—

The Plaintiff seeks to restrain the issue by the Defendants of three circulars, all of them relating to the trade or business of needle manufacturers. The Plaintiff trades as *S. Thomas & Sons*, and he also sells needles under the names of *George Holyoake* and of *Holyoake*. The first circular complained of was issued in February, 1879. [His Lordship read the circular and continued.]

(1) 9 Ch. D. 89, 92.
(2) 10 Ch. D. 294.
(3) *Ante*, p. 763.
(4) 11 Ch. D. 525, 537.
(5) 6 M. & W. 105.
(6) 2 Jur. 137.
(7) 11 Beav. 112.
(8) 9 Ch. D. 89.

Now, in order to appreciate the effect and meaning of that circular, it is necessary to know the circumstances relating to the trade of *J. Thomas & Sons* and the Plaintiff. According to the evidence before me, the Plaintiff's trade was begun in the year 1833 by his father. So far back as the year 1842 the Plaintiff's father began to export needles to *Sydney*, and from that time down to the present time he or his father has had a large trade with *Sydney* and the various other ports of *Australia*. It appears that from the year 1848 or 1849 down to the present time his labels have borne the name of *S. Thomas & Sons*. With regard to the firm of *J. Thomas & Sons*, whose goods are mentioned in this circular, it appears to me to be proved that their business was begun as far back as the year 1814 by *James Thomas*, who has been called *James Thomas* the elder; that in the year 1820, *James Thomas*, his son, started on his own account as a needle manufacturer, and that he subsequently (in the year 1846, I think) joined his father. His father died in April in the following year, and towards the end of that year *James Thomas*, the son, seems to have assumed, on his billheads at any rate, the title of *James Thomas & Sons;* and at a subsequent date the labels which he used were altered so that they bore also the description of *J. Thomas & Sons*. It appears to me quite clear from the evidence that for many years past—from the year 1867 at least—the trade has been exclusively carried on in the name of *J. Thomas & Sons*. It is also clear that from the year 1860 downwards the firm of *J. Thomas & Sons* have had a trade with *Australia*, although, in my judgment, neither their home trade nor their trade with *Australia* has been so extensive as that of *S. Thomas & Sons*. That circumstance is not immaterial in considering the motive and effect of the circular. It is material to add that it does not appear to me from the evidence that there were any other makes of needles, except those of the Plaintiff, which could be understood by the description of spurious makes of *J. Thomas & Sons'* needles. The Defendants have had the opportunity of shewing whether such makes existed, and they have not proved the existence of any class of needles to which the description can apply except those of the Plaintiff.

The next matter for consideration is the history of the firm of *George Holyoake*. It appears that some years ago *George*

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Holyoake established at *Redditch* the business of a needle manufacturer. It appears that, for the most part, he bought needles, although he did to some extent make or finish his own needles; that he was what is known in that district as a needle manufacturer; that in the year 1856 the Plaintiff's firm purchased that business of *George Holyoake;* that from that time down to the present they have sold needles, marked some as *Holyoake* only and some as *George Holyoake;* and that for the last twenty or twenty-five years those needles have been known in the Australian market to which this circular was addressed. Now the firm of *Holyoake,* which is referred to in the circular as the original and only manufacturer of the name of *Holyoake,* is a Mr. *Edmund Holyoake,* who has been trading from the year 1839 downwards in succession to his father; and it appears to me clear that that firm has had a considerable Australian trade. With regard to the firm of *Holyoake,* again, it does not appear to me that there were any other needles which could be supposed to be spurious as regards *Edmund Holyoake's* manufacture, except needles sold by the Plaintiff under the names of *George Holyoake* and *Holyoake.* These being the facts, the question arises what is the meaning of this circular, and how would it be understood by a person having a knowledge of the Australian trade corresponding with the facts which I have just stated? It appears to me that it can mean nothing else than this, that the needles of *Samuel Thomas & Sons* sold under their name are not an honest, independent make of needles, but are intended to imitate the needles of *J. Thomas & Sons*—that they are a spurious make of needles; and in like manner I think that it is intended to affirm that the needles sold by the Plaintiff under the names of *George Holyoake* and *Holyoake* are not a *bonâ fide* and original make of needles, but are imitations of the make of *Edmund Holyoake.* For such a suggestion it appears to me that there is no justification; and further, it appears to me clear that the effect of the circular is directly and clearly to work an injury to the Plaintiff's trade; and, as such, the circular appears to me to be a ground of action, subject to the various objections which were made on the part of the Defendants, and which I am now about to consider.

In the first place, it was urged that the Plaintiff is suing upon

a libel, and that since *Fox's Act* no relief can be given by any Court upon a libel unless the libel has been in the first place submitted to the decision of a jury. That objection appears to me entirely untenable, because, when *Fox's Act* is looked at, it is plain that it applies only to proceedings by way of criminal information or indictment for libel, and has nothing whatever to do with civil actions based upon the libel. The *Judicature Act* has pointed out the mode in which actions may be tried, and, according to my view, an action for libel may be tried under the *Judicature Act* in the same manner as any other action, that is to say, the right of determining which of the various modes of trial indicated by the rules is to be pursued rests, in the first place, with the Plaintiff, subject to a change in the mode of trial, either at the discretion of the Court itself, or by the direction of the Court upon the application of the Defendant. The Defendant in the present case made no attempt to change the mode of trial which the Plaintiff desired, and, in fact, this objection was never taken till the eleventh hour, after the case had proceeded to trial, and after the whole of the evidence, both for the Plaintiff and the Defendants, had been put in. I do not for a moment doubt that, in the exercise of its discretion as to whether a cause shall be tried before a jury or by a Judge sitting alone, the Court would have regard to the fact that a libel has for a long series of years been accustomed to be submitted to the decision of a jury, and certainly that consideration would weigh with me in ordinary cases. But here, the objection not having been taken before, it appears to me that it is too late to take it, and that, at the utmost, *Fox's Act* could only be used as influencing the discretion of the Court.

In the next place, it has been said that such an action cannot be maintained upon a statement such as is contained in this circular in the absence of evidence of special damage; and that in the present case there is no evidence of special damage. I have already said that in my opinion the circular is calculated and intended to do a serious injury to the Plaintiff's business; and, if the issue of such a circular cannot be restrained without proof of actual injury, it is obvious that preventive justice falls short of what it ought to accomplish in such a case as this; because to require evidence of injury in a case where the pro-

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spective injury is visible, and not to interfere until it has, to some extent, effected its injurious purpose, would be clearly a defect in the jurisdiction. And we are all acquainted with cases of trade-marks where the Court, seeing that a mark is designed, and will necessarily have the effect of perpetrating or assisting in the perpetration of a fraud, is accustomed to restrain the use of it, although no positive evidence has been given of injury resulting from its use. So much for the principle of the case; but upon the authorities it appears to me that I am fortified in arriving at the conclusion which I have already indicated. In *Riding* v. *Smith* (1) the point was fully considered by the Lord Chief Baron in his judgment. He said (2): "Supposing the statement made not to be slander but something else calculated to injure the shop-keeper in the way of his trade, as, for instance, the statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop, and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner. Then the question is whether such a statement would be actionable without proof of special damage. That was requisite in the cases of slander which have been cited, but it does not follow that it is necessarily so in such an action as the present"—that being an action by a draper, charging that the defendant had falsely and maliciously spoken and published of the wife of the plaintiff a certain slander which was in itself one calculated to work an injury to the plaintiff's trade. Again, in *Thorley's Cattle Food Company* v. *Massam* (3) the same point came under consideration. There the defendant had published a statement which the Court held to be injurious to the trade of the plaintiff company, and the question was discussed whether that statement could be restrained in the absence of evidence of special injury, although there was some evidence in that case of such special injury; and Vice-Chancellor *Malins* said (4): "I do not think that kind of evidence" (that

(1) 1 Ex. D. 91.
(2) Ibid. 94.
(3) *Ante*, p. 763.
(4) *Ante*, p. 774.

is, the evidence of positive injury) "is necessary, because if the Court sees clearly that the advertisement in itself is calculated to injure, that is, in my opinion, quite sufficient, without any positive evidence that injury has been sustained." Further on in the course of the same judgment the Vice-Chancellor said this (1): "Therefore, upon principle, I cannot entertain the least doubt that it is right and proper for this Court, where it sees that one trader is practising an unfair mode of trading, representing that his article is the only genuine one, from which it follows that all others are spurious; that that is so calculated to injure the business of another, that this Court, seeing it is a wrong which ought not to be repeated, will prevent it by injunction." That case afterwards went before the Court of Appeal, and the Lords Justices all agreed in affirming the decision of the Vice-Chancellor restraining the issue of the circular there complained of, and in the judgment of Lord Justice *Bramwell* (2) I find a very succinct statement of what he considered to be necessary to such an action. "I am satisfied," he says, "that this was a libel on the Plaintiffs in the way of their trade, and calculated to do them injury, and consequently an action is maintainable with reference to the advertisement as well as with reference to the circular." All his Lordship considered necessary was that the libel should be calculated to do injury to the trade. That objection, therefore, in my judgment, fails.

In the next place, it is said that, this being a libel, no injunction ought to be granted in respect of it. I am at a loss to see why a libel affecting property or trade may not be the subject of injunction. It is not necessary for me to point out the evident intention of the Legislature, as indicated by the 25th section of the *Judicature Act* of 1873, to enlarge rather than to diminish the power of the Court in respect of injunctions. But beyond that there are distinct authorities for the granting of an injunction in such cases. In the first place there is the case of *James* v. *James* (3), in which the Court restrained the publication of a statement indicating or suggesting that the plaintiff's goods were spurious, and, in granting the injunction which I am asked to

(1) *Ante*, p. 780. (2) *Ante*, p. 784.
(3) Law Rep. 13 Eq. 421.

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grant now, I shall be merely following the decision of the Master of the Rolls in that case. But it was justly observed that in that case the part of the injunction to which I refer was hardly the subject-matter of discussion, and therefore the case is not probably of any great weight on that ground. But in *Saxby* v. *Easterbrook* (1) the Common Pleas Division came to the conclusion that when the fact of a libel had been ascertained an injunction might be granted. Further, in *Thorley's Cattle Food Company* v. *Massam* the Vice-Chancellor, on an interlocutory motion, considered (2) the question how far an injunction could be granted to restrain a statement depreciatory of the plaintiffs' goods, and he expressed an opinion that such an injunction might be granted, although, in the particular circumstances of that case, and having regard to the novelty of the application, he thought it undesirable to grant it on the motion. But, when the matter came before him on the hearing, he referred to the judgment which he had then pronounced, and adhered to the conclusion which he had then expressed, and, accordingly, at the hearing, he granted an injunction to restrain the depreciatory statement. That case, as I have already said, went before the Court of Appeal, and the three Lords Justices who heard it all agreed in the view that the statement then in question was a libel, and that as such a libel it ought to be restrained. The Lord Justice *James*, who, it must be borne in mind, was a party to the decision in *Prudential Assurance Company* v. *Knott* (3), said this (4): "Having had our attention called to the evidence, we think that the executors have failed to prove that there was any foundation in point of fact for the assertion that the company were foisting on the public an article different in character from what they represented it to be." Therefore, he adopted the view of the Vice-Chancellor. And the Lord Justice *Bramwell* said (5), "I am satisfied that the two documents were libels. As to that one which uses the word 'foist,' it is needless to say anything, for it seems to be confessed on the part of the defendants, the executors, that it is a libel. I had some misgivings about the other one." Then he discussed the other, and

(1) 3 C. P. D. 339.
(2) 6 Ch. D. 582.
(3) Law Rep. 10 Ch. 142.
(4) *Ante*, p. 782.
(5) *Ante*, p. 781.

came to the conclusion that it was a libel calculated to do injury to the plaintiffs' business, and that consequently the action was maintainable. The injunction, therefore, in that case was upheld by the Court of Appeal. In the next place, I must consider to what extent the injunction is to go. It appears to me that I must restrain the issuing of the circular and restrain the Defendants from in any manner representing or suggesting that the goods now made or sold by the Plaintiff are imitations of the goods made or sold by *J. Thomas & Sons* or *Edmund Holyoake*. I desire to make this observation. It appears that with regard to the goods sold by *S. Thomas & Sons* under the simple name of *Holyoake*, there has been some question as to their right to do so; but the Defendants have not, in my judgment, shewn that Mr. *Holyoake* has any right to complain of that simple use of the name of *Holyoake*, and therefore I do not feel justified in limiting the injunction beyond the terms which I have mentioned. But I may say that I do not intend to interfere with any right which *Edmund Holyoake* himself may have to restrain the Plaintiff from selling his goods under the simple name of *Holyoake*.

[His Lordship then considered the two other circulars, and came to the conclusion that he could give no relief in respect of them. He proceeded:—]

I therefore dismiss so much of the action as prays for relief in respect of the second and third circulars, with costs, and I grant a perpetual injunction "to restrain the Defendants, their servants, &c., from issuing or permitting the issue of the circular dated the 6th of February, 1879, and from in any manner representing or suggesting that the goods now made or sold by the Plaintiff are imitations of the goods made or sold by *J. Thomas & Sons*, or *Edmund Holyoake*," with costs—the costs to be set-off.

Solicitor for Plaintiff: *S. Whitehead*, agent for *E. C. Browning, Redditch.*

Solicitors for Defendants: *Ley & Brocklesby.*

END OF VOL. XIV.

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ARBITRATION — *Partnership Articles — Agreement to refer to Arbitration—Revocation—Question whether Matters in dispute are within the Agreement—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.] Articles of partnership between the Plaintiff and other persons for performing a contract contained an agreement that any dispute between the partners should be settled by arbitration, but there was no agreement that the submission to arbitration might be made a rule of Court. One of the partners became a liquidating debtor, and the Defendant was appointed his trustee, and he elected to carry on the contract. The Defendant claimed to have purchased the shares of the Plaintiff and the other partners in the undertaking. The Plaintiff brought an action against the Defendant asking for an account of the partnership dealings. The main questions at issue were whether the shares of the other partners were purchased on behalf of the Plaintiff and Defendant or of the Defendant alone, and whether the Defendant had purchased the share of the Plaintiff as well as of the other partners.—The Defendant moved for an order under the *Common Law Procedure Act*, s. 11, staying all proceedings in the action, and referring the matters in question to arbitration, but before the motion was heard the Plaintiff revoked the agreement for arbitration:—*Held*, first, that although a particular submission to arbitration might be revoked, a general agreement to refer to arbitration could not be revoked by one of the parties; but,—Secondly, that the matters in dispute were not within the agreement for arbitration, and the motion was accordingly refused.—The question whether the matters in dispute are within the agreement for arbitration is one which the Court will decide, and will not leave to the arbitrator.—*Willesford* v. *Watson* (Law Rep. 8 Ch. 473) distinguished.—Whether the trustee in the liquidation was a party entitled to make the application within the 11th section of the *Common Law Procedure Act*, *quære*. Piercy *v.* Young [C. A. 200

2. —— *Reference to Arbitration — Making Award a Rule of Court—Appeal—Common Law Procedure Act* (17 & 18 *Vict. c.* 125), *s.* 17.] Where a reference to arbitration has been made under an agreement, the submission ought to be made a rule of Court, according to the practice in the Common Law Courts before the Judicature Acts.—But where a reference to arbitration had been directed by the Judge of the Chancery Division at the trial, and afterwards the award had been made an order of Court, and that order was not appealed from, it was *held* by the Court of Appeal that the award could not be disputed even though it was bad on the face of it. Jones *v.* Jones [C. A. 593

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ARTIZANS DWELLINGS IMPROVEMENT ACT, 1875 (38 & 39 *Vict. c.* 36), *schedule, sub-ss.* 8, 11, 12—*Compensation for Property taken—Provisional Award of Arbitrator—Omission of Interest—Final Award.*] The Metropolitan Board of Works, the "local authority" under *The Artizans and Labourers Dwellings Improvement Act*, 1875 (38 & 39 Vict. c. 36), served on the Plaintiff, the lessee of property required for an improvement scheme, a notice for him to send in a statement as to the nature of his claim. This was done, but the arbitrator appointed under the Act, through some omission, did not include the Plaintiff's interest in his provisional award, framed pursuant to sub-sect. 8 of the schedule to the Act. The Plaintiff subsequently received a two-days' notice to attend before the arbitrator that his claim might be considered. He attended accordingly, though under protest, and stated his claim, which was considered by the arbitrator, who altered his provisional award by inserting the amount of compensation awarded by him to the Plaintiff in respect of his interest. This was confirmed by the final award under sub-sect. 12. In an action to set aside the award:—*Held*, that, notwithstanding the omission of the Plaintiff's interest from the provisional award, he was a "person interested" therein within the meaning of sub-sect. 11, that the proceedings of the arbitrator in considering his claim under that sub-section, and in altering the provisional award in respect of his interest under sub-sect. 12, were regular, and that the final award was good:—*Held*, also, that, if there had been an irregularity, it would have been formal only and would have been cured by sub-sect. 12 of the schedule. Carr *v.* Metropolitan Board of Works - - - - - 807

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BANKRUPTCY—*Adjudication of Bankruptcy—Jurisdiction—Prior Adjudication by Irish Court — Discretion of Court — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 8.] A bankruptcy petition having been presented in an English County Court against a trader, who carried on business in *England* and *Ireland*, and had creditors and assets in both countries, he obtained an adjudication against himself on his own petition in the Irish Bankruptcy Court before the English petition could be heard. It was alleged that if an adjudication was made on the English petition the title of the trustee would relate back so

BANKRUPTCY—*continued.*

as to avoid certain transactions of the bankrupt which could not be avoided under the Irish adjudication. No one but the debtor opposed the English petition:—*Held*, that an adjudication ought to be made on the English petition for what it was worth, leaving for future determination the question in which Court the assets ought ultimately to be administered. *Ex parte* McCulloch. *In re* McCulloch - **C. A. 716**

2. —— *Adjudication of Bankruptcy — Two Petitions against same Debtor—Second Petition heard first—Collusion between Debtor and Second Petitioner—Power of Court over Conduct of Proceedings—Appeal—Locus Standi—"Person aggrieved"—Bankruptcy Act*, 1869 (32 & 33 *Vict., c.* 71), *s.* 71—*Bankruptcy Rules*, 1870, *rr.* 34, 42, 48, 60.] When two bankruptcy petitions are presented against the same debtor, and he consents under rule 42 to an immediate adjudication being made against him on the second petition, the first petition not having been served, the Court has power to hear the second petition first and make an immediate adjudication on it without requiring any notice to be given to the first petitioner. —But, if in such a case the adjudication on the second petition has been obtained by collusion between the debtor and the second petitioner, the Court has power to give the conduct of the proceedings under the adjudication, up to the appointment of a trustee, to the first petitioner.—The first petitioner is not a "person aggrieved" by the adjudication, within the meaning of sect. 71, and has no *locus standi* to appeal from it. *Ex parte* Mason. *In re* Waite - - **C. A. 71**

3. —— *Disclaimer by Trustee—Vendor and Purchaser — Bankruptcy — Freehold Estate of Bankrupt—Onerous Covenants—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23.] An owner of freehold property, "burdened with onerous covenants" within the meaning of sect. 23 of the *Bankruptcy Act*, 1869, the title deeds of which he had deposited with an equitable mortgagee, became bankrupt. The trustee in bankruptcy executed a disclaimer of the property under the said section. Subsequently he and the bankrupt purported to convey the property to the equitable mortgagee, whose assigns contracted to sell the same to a purchaser. On a summons taken out by the purchaser under the *Vendor and Purchaser Act*, 1874:—*Held*, that there had been a complete disclaimer by the trustee of the bankrupt's estate; that the subsequent conveyance was inoperative; and that the legal estate was outstanding and could not be got in under the *Trustee Act*, 1850.—*Semble*, where the freehold property of a bankrupt is disclaimed by the trustee under sect. 23 of the *Bankruptcy Act*, 1869, it reverts to the Crown. *In re* Mercer and Moore [287

4. —— *Distress — Mortgage — Attornment Clause—Excessive Rent — Bankruptcy of Mortgagor—Fraud on Bankruptcy Law—Leave to appeal to House of Lords—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 34, 71.] Though an attornment clause in a mortgage deed is a valid clause, if it constitutes a real relation of landlord and tenant between the mortgagee and the mortgagor, and a distress levied for the rent fixed by the clause will be good as against the trustee in the bankruptcy of the mortgagor, and will thus enable the mortgagee to obtain a security upon chattels of the mortgagor the proceeds of which would otherwise have been distributed among his creditors, yet, if the rent fixed by the clause be so excessive that the Court comes to the conclusion that it was not intended to create a real rent or a real tenancy, but that the clause was a mere device to enable the mortgagee, in the event of the bankruptcy of the mortgagor, to obtain an additional security upon chattels which would otherwise have been distributed among his creditors, the clause and any distress levied under it, even though before the commencement of the bankruptcy, will be invalid as against the trustee in the bankruptcy of the mortgagor, as being a fraud upon the bankruptcy law.—*Morton* v. *Woods* (Law Rep. 4 Q. B. 293) explained.—*Ex parte Williams* (7 Ch. D. 138) and *In re Stockton Iron Furnace Company* (10 Ch. D. 335) discussed.—Decision of *Bacon*, C.J., reversed.—In determining under sect. 71 of the *Bankruptcy Act*, 1869, whether leave should be granted to appeal to the House of Lords, the Court will be guided by the same principles as under sect. 18 of the *Bankruptcy Act*, 1849 (12 & 13 Vict. c. 106). *Ex parte* Jackson. *In re* Bowes - **C. A. 725**

5. —— *Fraud on Bankrupt Law—Building Agreement—Forfeiture of Materials in event of Builder's Bankruptcy—Protected Transaction—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 94.] An agreement, dated the 17th of September, 1878, between an owner of land and a builder provided that, in consideration of the rent thereby reserved and certain agreements on the part of the builder, the landowner would, as the builder should erect and completely cover in the messuages thereinafter agreed to be erected by him, demise to him a piece of land for ninety-nine years, at a yearly rent of £300. And the builder agreed to erect and completely finish forty houses, each of a specified value, within fifteen months from the date of the agreement, and vigorously and effectually to proceed continuously with all buildings once commenced by him on the ground, and to accept leases of the land and houses as the same should be erected and covered in. Until the leases should be granted the builder was to hold the premises subject to the payment of the rent, and to the observance and performance of his part of the terms and stipulations of the agreement, and subject to the power of distress and entry in default of any of the stipulations on his part, or on his becoming bankrupt or insolvent, in either of which cases all improvements, materials, and effects on the land, or adjacent thereto, which should not have been actually demised to the builder, should become absolutely forfeited to the landlord, but without prejudice to any right of action which might have accrued to him under the agreement (which was not to be construed as an actual demise), and the landlord was to be at liberty to re-enter and take possession of the ground, premises, chattels and effects, and to relet or sell the same, or otherwise to use and enjoy the same, as fully as if the agreement had

never been made. In January, 1879, the builder filed a liquidation petition. At this time there was a large quantity of building materials on the land comprised in the agreement, which had been placed there by the builder. Up to the time of the filing of the petition the builder had made no default in performing his agreement:—*Held*, that the provision for forfeiture of the materials to the landlord on the bankruptcy of the builder was void, as contrary to the policy of the bankruptcy law, and that the materials on the land were the property of the trustee in the liquidation.—*Brown* v. *Bateman* (Law Rep. 2 C. P. 272) and *Ex parte Dickin* (4 Ch. D. 524) distinguished.—Decision of *Bacon*, C.J., reversed. *Ex parte* Jay. *In re* Harrison - - - - C. A. 19

6. —— *Jurisdiction—Time for taking Objection—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.] The trustee in a bankruptcy applied to a County Court to set aside as fraudulent a mortgage which the bankrupt had executed. The Court directed the trial of certain issues by a jury, and the jury found that the deed was executed by the bankrupt without consideration, and with intent to defeat and delay his creditors. The County Court then declared the deed to be void, and ordered it to be delivered up to be cancelled. The mortgagee applied for a new trial, but the application was refused. He appealed to the Chief Judge from the order which declared the deed void, but did not appeal from the refusal of a new trial. On the hearing of the appeal, the objection was taken that the case was not one in which the Court of Bankruptcy ought to exercise its extraordinary jurisdiction under sect. 72:—*Held*, that the objection was raised too late after the mortgagee had taken his chance of a decision in his favour on the merits in the County Court.—*Ex parte Swinbanks* (11 Ch. D. 525) followed.—Decision of *Bacon*, C.J., reversed—*Held*, also, that, as there had been no appeal from the refusal of a new trial, the finding of the jury on the issues was conclusive, and the order declaring the deed void followed as a necessary consequence. *Ex parte* Butters. *In re* Harrison C. A. 265

7. —— *Jurisdiction — Charges of Trustee — Taxation—Composition under sect.* 28 *of Bankruptcy Act*, 1869—*Bankruptcy Rules*, 1870, *rr.* 108, 278.] The creditors of a liquidating debtor resolved on a liquidation by arrangement, and appointed a trustee and a committee of inspection, and they resolved that the remuneration of the trustee should be such as the committee of inspection should from time to time determine. Afterwards the creditors authorized the trustee to accept an offer made by the debtor, under sect. 28 of the *Bankruptcy Act*, 1869, to pay a composition, he also paying the costs, charges, and expenses of the solicitors, receiver, and trustee in relation to the settlement of his affairs and of the scheme of arrangement. The arrangement was approved by the Court:—*Held*, that after the confirmation of this scheme the Court had jurisdiction to tax the trustee's charges, notwithstanding that his account had been audited and approved by the committee of inspection subsequently to the confirmation of the composition arrangement. *Ex parte* Ranby. *In re* Ranby - - C. A. 467

8. —— *Order and Disposition—Bill of Sale—Apparent Possession—Fraudulent Preference—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.] If the grantee under an unregistered bill of sale has, before the bankruptcy of the grantor, acquired possession of the goods so as to exclude the apparent possession of the grantor, it is immaterial whether the possession has been obtained by means of a transaction which, taken *per se*, would have amounted to a fraudulent preference.—Decision of *Bacon*, C.J., reversed.—*Per James*, L.J.: Observations on *Darby* v. *Smith* (8 T. R. 82). *Ex parte* Symmons. *In re* Jordan - C. A. 693

9. —— *Proof in Bankruptcy—Partners—Joint and Separate Estate—Lease of Partnership Premises to Partners as Joint Tenants—Joint and Several Covenant to pay Rent—Disclaimer of Lease by Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 37.] When the trustee in bankruptcy of partners disclaims a lease of premises used by the partners for partnership purposes, but which was granted to the partners as joint tenants, they entering into a joint and several covenant to pay the rent, sect. 23 of the *Bankruptcy Act*, 1869, gives the lessor a right to prove against the separate estate of each partner for the injury caused to him by the disclaimer.—Whether a right is given to prove also against the joint estate of the partners, *quære.*—*Per Cotton*, L.J.: Sect. 37 applies only to proofs arising out of contracts; it does not apply to proofs made in pursuance of sect. 23. *Ex parte* Corbett. *In re* Shand [C. A. 122

10. —— *Proof in Bankruptcy—Provable Debt—Liability capable of being fairly estimated—Annuity payable to Wife under Separation Deed—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] By a separation deed between a husband and wife the husband covenanted with trustees to pay to them an annuity of £350, during the joint lives of himself and his wife, for her benefit. The annuity was made determinable in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of anything done, committed, or suffered by the other party after the date of the deed. The annuity was to be proportionally diminished in the event of the wife becoming entitled to any income independent of the husband exceeding £350 a year.—After the execution of the deed the husband filed a liquidation petition:—*Held*, that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation:—*Held*, also, that the trustee in the liquidation was entitled, if he desired it, to have the value assessed by a jury. *Ex parte* Neal. *In re* Batey [C. A. 579

11. —— *Secured Creditor—Composition Deed—Bankruptcy Act*, 1861, *s.* 197.] By a composition deed, dated the 4th of November, 1864, and duly registered under the *Bankruptcy Act*, 1861, a debtor, in consideration of a covenant on the part of himself and a surety to pay a composition of 10*s.* in the pound, obtained a release from his scheduled debts by a statutory majority of his creditors. The deed contained a proviso that every secured creditor should have the full benefit

BANKRUPTCY—*continued.*

and advantage of his security, and should be entitled to the composition after allowing for the value of such security.—Amongst the secured creditors was one for £229 8*s.* 5*d.*, whose security was a policy of assurance on the life of the debtor. The creditor valued the policy at £16; and for the difference, namely, £213 8*s.* 5*d.*, he received the composition of 10*s.* in the pound. The policy having fallen in after some premiums had been paid by the creditor:—*Held*, upon the construction of the deed, that the creditor, upon the execution of the deed, remained a creditor for £16 only, and that (the composition having been duly paid) the proceeds of the policy, after payment of £16 and interest, belonged to the debtor's estate, subject to repayment with interest to the creditor of premiums which he had paid. Bolton *v.* Ferro - - - - - - 171

12. —— *Secured Creditor — Execution — Delivery of Writ to Sheriff — Sale by Sheriff before Seizure — Payment of Execution Debt by Third Party—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16.] The sheriff cannot make a valid contract for sale of the goods of a judgment debtor against whom he holds a writ of *fi. fa.* until he has actually seized the goods.—After a writ of *fi. fa.* had been issued against a non-trader and lodged with the sheriff, but before any levy had been made, an arrangement (which the Court held to be fraudulent) was, with the knowledge of the under-sheriff, made between the debtor and *H.*, an auctioneer, that *H.* should, after a levy had been made, purchase goods of the debtor sufficient to satisfy the amount to be levied, and that he and the debtor should at once select the goods which *H.* was to purchase. *H.* knew that the debtor was about to file a liquidation petition. On the 19th of March the goods were selected, and were pointed out to *B.*, a clerk of the under-sheriff, who took a list of them, which he handed to the under-sheriff. On the 20th of March *B.* seized the goods and put a man in possession. Shortly afterwards the debtor filed a liquidation petition, but, before notice of the petition had been served on the under-sheriff, he had sent to *H.*, telling him that the seizure had been made, and that the selected goods were his property, and asking him to send a cheque for the amount of the levy. Later in the same day the under-sheriff gave up possession of the goods to a receiver who had been appointed under the petition, under the mistaken impression that the debtor was a trader. The next day *H.* sent a cheque for the amount of the levy to the under-sheriff, and out of the proceeds the execution debt was paid. A trustee having been appointed under the petition, *H.* applied to the Court for an order that the trustees should deliver up the selected goods to him, or pay him the amount which they had produced. The trustee had sold them for double what *H.* had paid:—*Held*, that the goods had never become the property of *H.*, and that, although, by virtue of the seizure before the filing of the petition, the execution creditor had acquired a security for his debt on the debtor's property, yet *H.*, who had chosen to enter into a fraudulent arrangement with the debtor with knowledge that he was about to

BANKRUPTCY—*continued.*

commit an act of bankruptcy, had no equity to be allowed to stand in the place of the execution creditor, notwithstanding the fact that, by paying the execution debt, he had relieved the debtor's estate from the necessity of paying it.—Decision of *Bacon*, C.J., affirmed. *Ex parte* Hall. *In re* Townsend - - - - C. A. 132

13. —— *Secured Creditor — Foreign Attachment—Lord Mayor's Court—Liquidation—Bankruptcy Act*, 1869, *ss.* 12, 16, *sub-s.* 5.] A creditor who has served a writ of foreign attachment in an action in the Lord Mayor's Court, but has not obtained judgment in the action before the commencement of the bankruptcy or liquidation of his debtor, is not a "creditor holding security on the property of the debtor," within the meaning of sect. 12 of the *Bankruptcy Act*, 1869. Levy *v.* Lovell - - - - - C. A. 234

14. —— *Secured Creditor — Sequestration — Chose in Action—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16—*Rules of Court*, 1875, *Order* XLII., *rr.* 1, 2, 4, 20; *Order* XLVII.] The mere issuing of a writ of sequestration against a Defendant and the service of it on a debtor to him, or a trustee of a fund for him, without anything further being done to render the sequestration effectual against the debt or fund, is not enough to make the Plaintiff a secured creditor of the Defendant within the meaning of the *Bankruptcy Act*, 1869.—Whether a writ of sequestration can be properly issued to enforce a simple judgment for a debt, or to enforce an order upon a judgment debtor's summons, *quære*. *Ex parte* Nelson. *In re* Hoare - - - - C. A. 41

15. —— *Secured Creditor—Valuation or Realization of Security — Declaration of Dividend — Reservation of Dividend by Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 40, 41, 42, 43, 72—*Bankruptcy Rules*, 1870, *rr.* 136, 272, 311, 312, 313, 314.] Until a secured creditor of a bankrupt or liquidating debtor has valued or realized his security he has no debt provable in respect of which the trustee is bound to make any reserve on declaring a dividend.—Decision of *Bacon*, C.J., reversed.—If, by reason of any special circumstances, a secured creditor is prevented from realizing his security before a dividend is declared by the trustee, the Court has power under sect. 72 to give such directions as may be proper to prevent any injustice being done.—*Per Cotton*, L.J.: Rule 136 applies only to the case of a secured creditor who desires to value instead of realizing his security, and even then it only gives the trustee, if he is dissatisfied with the value stated by the creditor, a power indirectly to compel the realization of the security, by refusing to admit the creditor's proof till he has realized the security.—Sect. 31 does not enable the trustee to make an estimate of the ultimate balance which may be due to a secured creditor who has not valued or realized his security. *Ex parte* Good. *In re* Lee - - - - - C. A. 82

16. —— *Practice — Appeal — Jurisdiction — Rehearing—Bankruptcy Appeal—Pending Appeal to House of Lords — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 18—*Judicature Act*, 1875

BANKRUPTCY—*continued.*

(38 & 39 *Vict. c.* 77), *s.* 9.] Whether the Court of Appeal has jurisdiction to rehear a bankruptcy appeal, *quære.*—But, if there be such a jurisdiction, the Court will not, while an appeal to the House of Lords from an order made by it on a bankruptcy appeal is pending, rehear the appeal *pro formâ*, for the purpose of inserting in its order evidence which was not before it when the appeal was heard, leaving the date of the order unaltered, or for the purpose of making a new order, bearing a date subsequent to the date of the presentation of the appeal to the House of Lords, with the new evidence inserted in it, but in other respects unaltered.—But, *semble*, that, if by an accidental slip evidence, which was really before the Court on the hearing of the appeal, had been omitted from the order, the Court could rectify the error, notwithstanding the pendency of an appeal to the House of Lords. *Ex parte* Banco de Portugal. *In re* Hooper - - - - - C. A. 1

17. —— *Practice—Appeal—Locus Standi—"Person aggrieved"—Refusal of Court to act on Report by Comptroller in Bankruptcy of Misfeasance of Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 20, 57, 71—*Bankruptcy Rules*, 1870, *r.* 251.] When the Court has refused to act on a report by the Comptroller in Bankruptcy that the trustee in a bankruptcy has been guilty of a misfeasance, neglect, or omission, by which the estate has sustained a loss which the trustee ought to make good, neither the bankrupt nor any of the creditors is entitled to appeal from the refusal.—The Comptroller alone is entitled to appeal.—*Ex parte Ditton* (11 Ch. D. 56) explained.—If the trustee has been guilty of a misfeasance, either the bankrupt or any of the creditors is entitled to make an application of his own to the Court under sect. 20, and, if the person so applying is dissatisfied with the order made, he has a right to appeal from it. *Ex parte* Sidebotham. *In re* Sidebotham - - - C. A. 458

18. —— *Practice—Costs—Set-off—Court of Bankruptcy—Bankruptcy Rules*, 1870, *rr.* 186, 188.] The Court of Bankruptcy will not allow costs of proceedings in the High Court to be set off against costs of proceedings in bankruptcy. *Ex parte* Griffin. *In re* Adams - C. A. 37

19. —— *Practice—Witness—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Bankruptcy Rules*, 1870, *r.* 171—*Discovery of Bankrupt's Property—Summoning Witnesses for Examination—Application by Creditor—Opposition by Trustee—Filing of Affidavits—Judicial Discretion of Registrar—Appeal.*] A creditor who applies to the Court under sect. 96 for leave to summon witnesses for examination as to a bankrupt, his trade dealings or property, is bound to shew a *primâ facie* probability that some benefit will result to the estate or to the creditors from the proposed examination.—Where the Registrar in the exercise of his judicial discretion has refused such an application, the Court of Appeal will not readily interfere.—The trustee in the bankruptcy has no interest in the matter except for the purpose of saying whether he is willing to conduct the examination himself, and, *semble*, he ought not to file affidavits in opposition to the application. *Ex parte* Nicholson. *In re* Willson - - - C. A. 243

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—— **r. 171** - - - - - 243
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—— **rr. 186, 188** - - - - 37
See Bankruptcy. 18.

—— **r. 251** - - - - - 458
See Bankruptcy. 17.

BILL OF SALE—*Mortgage of Stone Quarry—Fixtures—Tramways and Steam Crane—Bills of Sale Acts*, 1854 *and* 1878.] By a deed of mortgage of a stone quarry the quarry was granted, together with the mills, buildings, steam engines, motive power, plant, fixed and moveable machinery, apparatus, rails, sleepers, implements, fittings, and fixtures of every description, then or at any time thereafter fixed to, or placed upon, the hereditaments; all in the same witnessing part.—The mortgage was executed after the passing of the *Bills of Sale Act*, 1878, but before the 1st of January, 1879, when that Act came into operation.—At the date of the mortgage there was a tramway in the quarry, and there was also a steam crane, cramped on to large stones, and kept in position by two guys:—*Held*, that the tramway and crane were fixtures, and that the mortgage did not require registration either under the old or under the new *Bills of Sale Act*, in order to give the mortgagee the right to retain the tramways and crane as part of his security, as against a liquidation trustee.—Observations on the meaning and object of the 7th section of the *Bills of Sale Act*, 1878. *Ex parte* Moore & Robinson's Banking Company. *In re* Armytage - 379

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BUILDING SOCIETY—*Mortgage—Statutory Receipt—Successive Incumbrancers—Priority—Right to call for Legal Estate—"Owner of Equity of Redemption"—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 42.] When the legal estate in land has been vested in a building society as mortgagees, and the society, on being paid off, indorses a receipt on the mortgage deed, as provided by sect. 42 of the *Building Societies Act*, 1874, the effect of the receipt is to vest the legal estate in the person who in equity is best entitled to call for it, and not necessarily in the person who actually paid off the society. Thus, where there are successive equitable mortgages, and the society is paid off by the mortgagor, the effect of the statutory receipt is to vest the legal estate in the equitable mortgagee who is first in point of time; unless the society is paid off by an equitable mortgagee who had no notice of prior incumbrances, in which case the legal estate vests in that mortgagee, notwithstanding that there are incumbrances prior to his in point of date.—*Pease v. Jackson* (Law Rep. 3 Ch. 576) considered.

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COMMISSIONERS OF SEWERS—*Compulsory Purchase—Notice to treat—Several Juries.*] Where, under 57 Geo. 3, c. xxix., notice had been served on the owners in fee of four houses requiring them to treat for the sale to the Commissioners of Sewers, the Commissioners will not be allowed to s m non a jury to assess the value of one of the houses separately. Ecclesiastical Commissioners *v.* Commissioners of Sewers of the City of London - - - - - **305**

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COMPANY—*Contract for paid-up Shares—Contributory—Payment in Cash—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] Y. agreed to sell land to *H.* and *W.* for £7713. *H.* and *W.* agreed to sell to the company for money payable by instalments. The company being short of money, it was arranged that *Y.* should accept £2000, part of the money, in fully paid-up shares. The land was accordingly conveyed by *Y.* to the company in consideration of £5713 in cash and £2000 in fully paid-up shares:—*Held* (reversing the decision of *Little*, V.C.), that an arrangement between

COMPANY—*continued.*

the company, *H.* and *W.*, and *Y.*, for paying £2000, part of the sum due from the company to *H.* and *W.*, by writing off a like amount of the sum due from *H.* and *W.* to *Y.*, was equivalent to a cash payment of £2000 by *Y.* to the company, and that the shares thus taken by *Y.* were to be treated as fully paid up, as in *Spargo's Case* (Law Rep. 8 Ch. 407) and *Ferrao's Case* (Law Rep. 9 Ch. 355). *In re* Barrow-in-Furness and Northern Counties Land and Investment Compny [**C. A. 400**

2. —— *Contract for paid-up Shares — Non-registration of Contract — Companies Act*, 1867, *s.* 25.] A contract for sale and purchase between two vendors and a limited company provided that the purchase money of £5115 should be "paid or satisfied" as to £2000 to *B.*, one of the vendors, and as to the remaining £3115 to *H.*, another vendor; that of *B.'s* £2000, the company should pay to him £500 in cash, and satisfy the remaining £1500 by issuing or transferring to him 300 fully paid-up shares of £5 each, and registered as fully paid up; and that as to the £3115, the company should either pay the same to *H.* in cash, or, at the option of either the company or *H.*, should issue or transfer to *H.* 623 shares of £5 each, issued and registered as fully paid up.—The contract was never filed with the Registrar of Joint Stock Companies.—The 300 shares were issued as fully paid up to *B.*, who was the chairman and managing director of the company down to the date of the winding-up, soon after which event *B.* died.—The 623 shares were issued as fully paid up to *H.*, who transferred 134 of them for value to the applicant, who was the paid secretary and solicitor of the company. *H.* also transferred 450 others for value in the following way: 120 were transferred direct to *B.*; 100 were transferred to the applicant, who transferred them for value to *B.*; and 230 more were transferred to strangers, who again transferred them, some for value, and a few for a nominal consideration only, to *B.*—Upon *B.'s* death the applicant became his executor:—*Held*, by *Bacon*, V.C., that the applicant must be placed on the list of contributories for the 134 shares standing in his own name, and for the 750 standing in the name of his testator, as shares to be paid for, under sect. 25 of the *Companies Act*, 1867.—*Held*, on appeal (affirming the decision in other respects), that the 230 shares having been transferred to purchasers without notice that they were not fully paid up, and being registered in the books of the company as paid-up shares, must, as between the company and the transferees, be treated as fully paid up shares, and that the transferees could give a good title to purchasers from them, whether with or without notice, and that accordingly those shares when transferred to *B.* must be equally treated as paid up, although he had purchased them with notice that they were not in fact paid-up shares. *In re* Stapleford Colliery Company. Barrow's Case [**C. A. 432**

3. —— *Contract for paid-up Shares—Advertisements for Company—Agreement to give fully paid-up Shares—Non-registration under sect. 25 of Companies Act*, 1867—*Contributory Negligence — Voluntary Winding-up — Right of Action—*

COMPANY—*continued.*

Claim for Damages allowed.] A company agreed to give *M.*, a newspaper proprietor, fully paid-up shares in discharge of his account rendered, for advertisements. The contract was not registered, but shares were allotted to *M.* purporting to be fully paid up, and the liquidator in a voluntary liquidation placed *M.* on the list of contributories for the shares allotted to him. Shares had been taken at par after the allotments to *M.*:—*Held*, that *M.* had a right to prove for damages to the amount of the calls made or which might be made upon him, and that the fact that the contract which required registration was in his hands was no bar to the claim. *In re* GOVERNMENT SECURITY FIRE INSURANCE COMPANY. MUDFORD'S CLAIM - - - - - - 634

4. —— *Costs — Winding-up — Unsuccessful Litigation — Summons — Priority.*] Where an official liquidator has failed on a summons to recover money for the company, and has been ordered to pay the costs of the summons out of the assets of the company, these costs will be paid out of the assets in priority to the costs of the winding-up. *In re* HOME INVESTMENT SOCIETY [167

5. —— *Debenture-holder—Deferred Security—Winding-up—Maturing of Security.*] A company borrowed money upon the security of debentures, each of which contained a covenant with the holder to pay the principal at a future date with interest in the meantime, an assignment to the holder of all the stock chattels and effects which might from time to time be held by the company, and a charge of the same as security for the repayment of principal and interest, with a proviso that until default in payment of principal or interest for twenty-one days after the same respectively ought to be paid the company might receive and apply all its assets for its own purposes. Before the principal money became due or the interest had fallen into arrear, the company went into liquidation:—*Held*, that the moment the winding-up commenced the money secured by the debentures became payable, and the debenture a security enforceable upon all the assets of the company as they existed at the date of the winding-up. HODSON *v.* TEA COMPANY - 859

6. —— *Director—Summons under Companies Act*, 1862, *s.* 165, *against Directors allowed; against Executors of a Director, dismissed, with Costs—Resolution of Company to invest Moiety of Premiums—Form of Policy—Directors, Representations and Breach of Trust by—Summons by Liquidator and Policy Holder jointly—Liability of Directors.*] The executors of a director, deceased, not being officials of a company, cannot be proceeded against by summons taken out under the provisions of the 165th section of the *Companies Act*, 1862.—*Feltom's Executors' Case* (Law Rep. 1 Eq. 219) followed.—A company in 1872 passed a resolution that for the better security of the policy holders 50 per cent. of the premiums paid on whole life policies should be invested in Government securities in the names of trustees, and representations were made by the directors of the manner in which the investments were made; but in the winding-up of the company it was discovered that premiums had been received and in-

COMPANY—*continued.*

vestments had not been made, as represented; and that the investments of premiums which had been made had been sold out, and the proceeds applied towards the general purposes of the company.—On summons by the liquidator and a whole life policy holder jointly, under the *Companies Act*, 1862, s. 165, for a declaration that the directors were liable to account to the company for a moiety of the premiums received:—*Held*, that the summons was maintainable as against the surviving directors; that the directors were liable, as for a breach of trust, for a moiety of the premiums which ought to have been invested; and that the policy holder was a creditor of the company and rightly joined with the liquidator in the summons. *In re* BRITISH GUARDIAN LIFE ASSURANCE COMPANY - - - - - - 335

7. —— *Director—Companies Act*, 1862, *s.* 165—*Misfeasance of Directors—Acting as Director without Qualification.*] Two gentlemen were appointed, and for some time acted, as directors of a company in which the qualification for a director was the holding 100 shares. Neither of them was the holder of any shares. No act of misfeasance was alleged against either of them for which he would have been liable if he had been a duly qualified director. The company was now in course of being wound up. The liquidator applied under sect. 165 of the *Companies Act*, 1862, to charge them for misfeasance in acting as directors without qualification:—*Held*, by the Master of the Rolls, that by acting as directors they had been guilty of a misfeasance, for which they were liable under the *Companies Act*, 1862, sect. 165, and ought to be ordered to pay a sum equal to the nominal amount of the shares requisite to qualify them to be directors.—*Held*, on appeal, that sect. 165 creates no new right, but merely provides a summary mode of calling directors to account for acts of impropriety, for which they are liable to an action; that to make a person liable under it, he must be shewn to have been guilty of some misconduct by which the company has suffered loss; and that the application must, therefore, be dismissed. *In re* CANADIAN LAND RECLAIMING AND COLONIZING COMPANY. COVENTRY AND DIXON'S CASE - - - C. A. 660

8. —— *Director—Winding-up—Liability of Directors—Purchase from themselves on behalf of the Company—Fraud on the Public—Conversion of Cost-book Mine into Joint Stock Company.*] The shareholders in a cost-book mine were desirous of converting it into a limited company. They accordingly assigned the mine to a trustee; and then *T.* and *M.*, the two principal shareholders, signed an agreement on behalf of the intended company to purchase the mine of the trustee for £24,000, to be paid in shares of the new company, partly paid up and partly unpaid. The value of the mine at that time was about £6000. The company was formed and registered with a nominal capital of £36,000 in 18,000 shares of £2 each, and *T.* and *M.* were two of the first directors. The agreement for purchase of the mine was sanctioned by the directors and carried into effect, and the whole of the shares in the company were allotted to the shareholders of the cost-book mine, some as paid-up and others as partly paid-up

COMPANY—*continued.*

shares, to the nominal amount of £24,000. Afterwards the company was wound up, and the official liquidator claimed to make *T.* and *M.* account for the difference between the nominal value of their shares and the actual value of their interest in the cost-book mine:—*Held*, that, although the scheme, by which the mine was estimated much beyond its true value, might have been intended to deceive the public, there was no fraud upon the company, all the members of which were parties to the arrangement; and that *T.* and *M.* were not accountable to the company for any profit they had made or might have made by the transaction. *In re* Ambrose Lake Tin and Copper Mining Company. *Ex parte* Taylor. *Ex parte* Moss [C. A. 390

9. —— *Foreign Company — Winding-up — Calls — Scotch Order — Companies Act*, 1862, *ss.* 122, 123.] Where, in the winding-up of a company by the Court of Session in *Scotland*, an order for a call has been made by that Court, and it has become necessary to enforce the call against contributories resident in *England*, the order must be made an order of the Chancery Division in *England*.—*In re Hollyford Copper Mining Company* (Law Rep. 5 Ch. 93) followed. *In re* City of Glasgow Bank - - - - 628

10. —— *Staying Proceedings—Limited Company — Presentation of Winding-up Petition — Action in Common Law Division—Execution by Sheriff—Companies Act*, 1862, *ss.* 85, 87; *Judicature Act*, 1873, *s.* 24, *sub-s.* 5; *Judicature Act*, 1875, *s.* 11, *sub-s.* 1.] Where an action has been brought against a limited company in a Common Law Division, any application under sect. 85 of the *Companies Act*, 1862, to stay proceedings in the action during the pendency of a winding-up petition in the Chancery Division—as for instance, an application to restrain proceeding with an execution against the company under the judgment—should, having regard to sect. 24, sub-sect. 5, of the *Judicature Act*, 1873, and sect. 11, sub-sect. 1, of the *Judicature Act*, 1875, be made in the Common Law Division to which the action is attached, and not in the Chancery Division.—*In re Perkins Beach Lead Mining Company* (7 Ch. D. 371) disapproved of. *In re* Artistic Colour Printing Company - - - - 502

11. —— *Winding-up Petition—Companies Act*, 1862, *s.* 79, *sub-s.* 2—*Shareholder's Petition.*] A company which was formed for building and using and letting assembly rooms, bought the site and carried the building up to the level of the street by the end of 1875. Shortly afterwards trade in the neighbourhood became depressed, and the directors, with the sanction of the great body of the shareholders, resolved to proceed no further till times improved. In July, 1879, a shareholder presented a petition for winding up, on the ground that the company had suspended business for more than a year. It was stated that the sum which could still be raised by calls was sufficient to erect rooms, though not on so large a scale as originally proposed, but it was not alleged that the company could carry on the proposed business at a profit. Fully four-fifths in value of the shareholders opposed the winding-up, which was supported by about one-eighth in

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value:—*Held*, by the Court of Appeal, reversing the judgment of *Bacon*, V.C., that a winding-up order ought not to be made. *In re* Middlesborough Assembly Rooms Company C. A. 104

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—— Sale of lease—Covenants - - 249
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COST-BOOK MINE—Conversion into joint stock company - - - - 400
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—— Affidavit on appeal - - - 285
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—— Official liquidator—Unsuccessful summons
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—— Partition Act - - - - 512
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—— Security for - - - - 419
See PRACTICE. 9.
—— Trade-mark—Registration - - 585
See TRADE-MARK. 1.
—— Withdrawal of defence—Unnecessary litigation - - - - 188
See PRACTICE. 7.

COVENANT—*Mortgage of Reversionary Interests—Covenant for Compound Interest—Interest Capitalized*—3 & 4 *Will.* 4, *c.* 27, *s.* 42—*Six Years' Interest.*] *A.* and *B.*, reversioners after a life interest in *C.*, mortgaged their property and covenanted that interest in arrear should be capitalized, and bear interest after the same rate; and *C.* also assigned her life interest as part of the security:—*Held*, that the covenant was good and valid; and that the mortgagee was not limited to six years' interest. CLARKSON *v.* HENDERSON - - - - - 348
—— Lease—Conditions of sale - - 249
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CREDITORS' DEED—Secured creditor—Bankruptcy - - - - - 171
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DAMAGES—*Lord Cairns' Act*—21 & 22 *Vict. c.* 27, *s.* 3—*Damages accrued after issue of Writ.*] Where damages are claimed in substitution for an injunction to restrain a wrongful act commenced before the issue of the writ and continued afterwards, if the wrongful act has come to an end before the trial the Court has jurisdiction under sect. 3 of *Lord Cairns' Act*, to assess the whole of the damages accrued.—*Davenport* v. *Rylands* (Law Rep. 1 Eq. 302) followed.—*Lord Cairns' Act* remains in force notwithstanding the passing of the Judicature Acts. FRITZ *v.* HOBSON 542

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DISCLAIMER—Trustee in bankruptcy 122, 287
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DISTRESS—Attornment clause in mortgage 725
See BANKRUPTCY. 4.

DISTRIBUTIONS, STATUTE OF—*Intestacy—Next of Kin—"Children"—Legitimacy—Domicile—Foreign Law.*] The word "children" in the *Statute of Distributions* (22 & 23 Car. 2, c. 10) means children according to the English law, and therefore does not include children who, though legitimate according to the law of another country, are illegitimate according to the English law.—On the death of an intestate domiciled in *England*, a child of a deceased brother of the intestate, legitimate according to the law of *Holland*, where she was born, and legitimated on a subsequent marriage of her parents, but illegitimate according to the English law, claimed a share of the intestate's personal estate as one of her next of kin under the *Statute of Distributions*:—*Held*, that the claimant, being illegitimate according to the English law,

DISTRIBUTIONS, STATUTE OF—*continued.*
was excluded.—*Goodman* v. *Goodman* (3 Giff. 643) and *Boyes* v. *Bedale* (1 H. & M. 798) considered. *In re* Goodman's Trusts - - 619
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EVIDENCE—*Admissibility—Copies of Entries in Bankers' Books—Bankers' Books Evidence Act*, 1879 (42 & 43 *Vict. c.* 11), *ss.* 3, 10.] The effect of sect. 3 of the *Bankers' Books Evidence Act*, 1879, is to make copies of entries in the books of a banker admissible evidence against any one:—Therefore, copies of entries in the books of the bankers of a defendant are evidence against the plaintiff. Harding *v.* Williams - **C. A.** 197

2. —— *Presumption of Death—Trust by Deed for Person named—Person not heard of for Seven Years—Onus Probandi.*] By deed, dated in 1866, trusts of personalty were declared, after the death of the settlor, in favour of a person by name. The named person had not been heard of since 1861. There was no evidence as to the date of his death, and on the death of the settlor her representatives claimed the money, contending that there was a resulting trust in her favour:—*Held*, that where a trust was declared by deed in favour of a named person, such person must, until the contrary was shewn, be taken to have been in existence at the date of the deed; that the *onus* of proving his death before that date lay on the representatives of the settlor, and as it had not been discharged by them, there was no resulting trust, and the money must be paid to the representatives of the named person. *In re* Corbishley's Trusts - - - - - 846
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FOREIGN CHARACTERS—Trade-mark - 585
See Trade-mark. 1.
FOREIGN JUDGMENT—*Enforcing in English Court.*] The principles on which the Court acts in enforcing judgments of a foreign Court discussed.—The Defendant, a Swiss subject, entered into an agreement with the Plaintiffs, French subjects residing in *France*, when he was in *France* on a temporary visit, he being then domiciled in *Switzerland* but residing in *England*. The Plaintiffs afterwards obtained judgment against him in a French Court for breach of the agreement. He was not in *France* at the commencement of or at any time during the action, and he had no notice of the proceedings, though the Plaintiffs knew his address in *England*, where he was then still residing:—*Held*, that the judgment could not be enforced by an English Court.—*Schibsby* v. *Westenholz* (Law Rep. 6 Q. B. 155) considered. Rousillon *v.* Rousillon - 351
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FOREIGN MANUFACTURE—Sale in *England*
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FORESHORE—*Removal of Shingle—Injury to neighbouring Landowner—Duty of Crown to protect the Realm.*] It is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers; and therefore no subject is entitled to destroy a natural barrier against the sea. And if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it.—In an action by the owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the Defendant, the owner of the foreshore, from removing shingle therefrom, so as to expose the Plaintiff's land to the inroads of the sea; although the shingle was removed for sale in a natural and ordinary user of the land.—The decision of *Fry*, J., affirmed. Attorney-General *v.* Tomline - - - **C. A.** 58
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HERALDS' COLLEGE—*Privileged Communication—Recording of Pedigrees—Protest—Employment of Pursuivant—Unprofessional Agent—Legal Adviser.*] A Pursuivant of the *Heralds' College* employed in the conduct and support of a protest against a pedigree sought to be inrolled in the *Heralds' College* is not a legal adviser, and therefore communications between him and his employer are not privileged in a Court of Law.
Slade *v.* Tucker - - - - 824
HIGHWAY—Obstruction - - - 542
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HUSBAND AND WIFE—*Covenant by Married Woman—Separate Estate—Judgment—Existing Property—Restraint against Anticipation.*] Judgment on the covenant of a married woman entitled to separate estate binds the separate estate which she has at the time when the judgment is given, including (if her husband is then dead) estate given to her separate use with a restraint against anticipation. Pike *v.* Fitzgibbon - - 837
—— Equity to settlement - - 506, 516
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IGNORANCE OF FACT—Release - - 829
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INCAPACITY—Lunatic - - - 674
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INFRINGEMENT—Patent - - - 230
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—— Restraint of trade—Dealing with customers
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—— Life policy—Investment of premiums 335
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—— Life—Covenant in settlement - 603
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INTEREST—*Covenant to pay Money on a Day certain—Rate of Interest.*] By a mortgage deed reciting an agreement for an advance of £10 per cent. the mortgagor covenanted for payment of the principal sum at the expiration of twelve months, and for the payment of interest in the meantime at the rate of £10 per cent. per annum, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for repayment. The money was not repaid on the day, but interest at £10 per cent. was paid for several years. The mortgagor having died, and a decree having been made for administration of his estate, the mortgagee proved as a creditor for the principal sum and interest:—*Held*, that interest was recoverable only as damages, and ought to be limited to £5 per cent. *In re* Roberts. Goodchap *v.* Roberts - - C. A. 49
—— Mortgage—Covenant for compound interest
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—— Married woman—Separate estate - 837
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JURISDICTION—Bankruptcy 1, 265, 467, 716
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—— Civil Service pension - - - 311
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—— Service out of - - - - 849
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—— Trustee out of—New trustees - - 310
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JUST ALLOWANCES—Mortgage—Foreclosure
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LANDLORD AND TENANT—*Lunatic—Execution of Lease by Committee—Sale of Leaseholds—Vendor and Purchaser—Conditions of Sale—Continuing Breach of Covenant.*] By an order in lunacy the committees of Sir *H. M.* were empowered, with the sanction of the Masters in Lunacy, in the name and on behalf of Sir *H. M.*, to concur in all deeds affecting any hereditaments belonging to the firm in which Sir *H. M.* was a partner which should have been executed by the other partners. By a deed expressed to be made between Sir *H. M.* by *A. B.* and *C. D.*, his committees, and *D. C. M.* and *R. B.* (the said Sir *H. M.*, *D. C. M.*, and *R. B.*, carrying on business in co-partnership, and thereinafter called the lessors) of the one part, and a lessee of the other part, the lessors (the said Sir *H. M.* acting by the said *A. B.* and *C. D.* as such committees as aforesaid) demised the property to the lessee. The testimonium clause was, "In witness whereof the parties to these presents have hereunto set their hands and seals . . ." *A. B.* signed his name against one seal and *C. D.* against another, and the attestation clause was "Signed, sealed, and delivered by the within named *A. B.* and *C. D.* in the presence of," &c.:—*Held*, by the Court of Appeal, reversing the decision of *Hall*, V.C., that the lease was well executed on behalf of Sir *H. M.*—A lease contained a covenant on the part of the lessee that

LANDLORD AND TENANT—*continued.*

he would not carry on or permit to be carried during the term on any part of the demised premises any trade or business except that of a licensed victualler without the license of the lessors, and there was a clause of re-entry for breach of covenant. The lessee underlet parts of the property to persons who carried on other trades there. The lessors with knowledge of this went on receiving rent. The property was put up for sale under a condition that the production of the last receipt for rent should be conclusive evidence of the performance of the covenants or waiver of any breaches of them up to the time of completion. In an action for specific performance, a reference as to title having been directed:—*Held*, by the Court of Appeal, that the condition was binding, and that the purchaser was bound to accept the title notwithstanding the breaches of covenant:—*Held*, also, that the question whether, assuming the breach to be a continuing breach such as to render the purchaser liable to be evicted immediately after completion, notwithstanding any waiver up to completion, a Court of Equity would force the purchaser to accept the title, was a question to be decided at the trial, and not on a reference as to title.—*Per Bramwell*, L.J.:—Whether the decision in *Walrond* v. *Hawkins* (Law Rep. 10 C. P. 342) is applicable to a case where the covenant is simply not to permit the property to be used in a particular way, *quære*. Lawrie *v.* Lees - C. A. 249

—— Distress—Attornment clause in mortgage
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LANDS CLAUSES ACT—*Costs—Local Authority—Purchase of Land—Payment out of Court—Petition—Costs—Incumbrancers—Service—Lands Clauses Consolidation Act*, 1845, *s.* 80—*Artizans' and Labourers' Dwellings Improvement Act*, 1875, *Sched., ss.* 24, 25.] Where purchase-money has been paid into Court under the *Lands Clauses Consolidation Act*, 1845, or the *Artizans' and Labourers' Dwellings Improvement Act*, 1875, and a petition is presented for payment out either to or with the consent of incumbrancers, the only costs which the company or local authority (as the case may be) can be required to pay, in addition to the Petitioner's costs, are the sum of 42*s.* for the incumbrancers' costs, and a further sum sufficient to cover the costs of an affidavit of service of the petition upon the incumbrancers.—*In re Halstead United Charities* (Law Rep. 20 Eq. 48) followed. *In re* Artizans' and Labourers' Dwellings Improvement Act, 1875. *Ex parte* Jones - - - - - - 624

2. —— *ss.* 7, 69—*Payment of Purchase-Money to Trustees—Sale by Tenant for Life.*] Where lands settled in trust for a widow during her life or until her second marriage, and, after her death or second marriage, in trust for sale, were purchased from the widow by a railway company under the 7th section of the *Lands Clauses Consolidation Act*, 1845, the purchase-money, which had been paid into Court by the company under the 69th section, was, on the petition of the widow, ordered to be paid out to the trustees of the settlement, they undertaking to hold the same upon the trusts of the settlement. *In re* Evans' Settlement - - - - 511

LANDS CLAUSES ACT—*continued.*

3. —— *s.* 79—*Person absolutely entitled—Payment out—Adverse Possession—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 3, 5.] A person shewing title by adverse possession for twenty-six years after the expiration of a term for 192 years to land taken under the provisions of the *Lands Clauses Act*, 1845, will, in the absence of any claim by, or evidence of the existence of, the reversioner, be deemed to be the owner of the land, and entitled to the purchase-money under the *Lands Clauses Act*, 1845, s. 79. *In re* METROPOLITAN STREET IMPROVEMENT ACT, 1877. *Ex parte* CHAMBERLAIN - - - - 323

4. —— *ss.* 74, 80—*Purchase-Money—Leaseholds—Compulsory Sale—Tenant for Life and Remainderman—Benefit of Tenant for Life in the Proceeds of Sale—Costs.*] Petitioner was entitled for life under a marriage settlement to leaseholds, which had eight years to run. The trustees of the settlement had power to sell the leaseholds with his consent, which he declined to give. The leaseholds were taken under the powers of the *Lands Clauses Act*, and the proceeds of sale were paid into Court, and invested. The purchase-money was sufficient to provide an annuity for eight years of much larger amount than the net annual proceeds of the leaseholds:—*Held*, by *Bacon*, V.C., that the Petitioner was entitled out of the income, and by sale from time to time of the capital, of the investment, to an annuity for a period corresponding to the residue of the term, of the same amount only as the average net annual proceeds of the leaseholds before sale.—*Held*, by the Court of Appeal, that the Petitioner was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run.—A contest between the tenant for life and remainderman as to how much of the fund belonged to one of them and how much to the other:—*Held*, by *Bacon*, V.C., to be a litigation between adverse claimants within sect. 80; but this decision was disapproved of by *Jessel*, M.R. ASKEW *v.* WOODHEAD - - C. A. 27

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See WILL. 1.

LEGAL ADVISER—Privileged communication—Officer of *Heralds' College* - 824
See HERALDS' COLLEGE.

LEGAL ESTATE—Right to call for—Successive mortgages - - - - 140
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LEGATEE—Debt of—Assent of executors to legacy - - - - - 374
See ADMINISTRATION.

LEGITIMACY—Statute of Distributions - 619
See DISTRIBUTIONS, STATUTE OF.

LETTER—Assignment by—Voluntary settlement
See VOLUNTARY SETTLEMENT. [179

LIBEL—*Injurious to Trade—Injunction.*] *Joseph Thorley* died in 1876, having for years carried on the manufacture of a condiment well known as "*Thorley's Food for Cattle.*" His executors continued his business. In 1877 a company was formed for manufacturing the same article, and employed a brother of *Joseph Thorley* who was acquainted with the secret of the manufacture. The executors published in the newspapers an advertisement warning the public that any food purporting to be *Thorley's* food for cattle, and not signed "*Joseph Thorley*," was not the manufacture of the establishment carrying on business as *Joseph Thorley*, the proprietors of which were alone possessed of the secret for compounding the food. The executors also issued a circular to their customers warning them against the course pursued by the company "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late *Joseph Thorley*." The Court came to the conclusion that there was no substantial difference between the food sold by the executors and that sold by the company:—*Held*, by *Malins*, V.C., and by the Court of Appeal, that the advertisement and circular contained untrue representations calculated to injure the company in their trade, and that the issuing of them ought to be restrained by injunction. THORLEY'S CATTLE FOOD COMPANY *v.* MASSAM - C. A. 763

2. —— *Injurious to Trade—Injunction—Jurisdiction—Right to Trial by Jury—Proof of actual Damage—Fox's Act* (32 *Geo.* 3, *c.* 60)—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Court*, 1875, *Order* XXXVI., *r.* 3.] The Court has now jurisdiction to restrain by injunction the publication of a libel injurious to trade.—In order to obtain an injunction in such a case it is sufficient for the Plaintiff to shew that the libel is calculated to injure his trade; it is not necessary that he should prove actual damage.—The Defendant in a civil action for libel has the same right to a trial by jury as the Defendant in any other civil action; he has no higher right.—*Fox's Act* (32 Geo. 3, c. 60) does not apply to a civil action for libel. THOMAS *v.* WILLIAMS - 864

LIEN—Vendor—Sale of goods - - 446
See SALE OF GOODS.

LIFE ESTATE—Power of appointment—Construction of will - - - 263
See WILL. 3.

LIGHT—*Building pulled down—Injunction—Ecclesiastical Commissioners—Statute* 23 & 24 *Vict. c.* 142.] Under the statute 23 & 24 Vict. c. 142, and an Order in Council, an ancient church in the city of *London* was vested in the Ecclesiastical Commissioners, upon trust to pull down the building, dispose of the materials, and sell the site. They pulled down the church, and the site was still vacant. The Defendant, who had become the owner of land formerly part of the glebe of the church, on which some low buildings had stood, commenced the erection of buildings which, if completed, would have materially obstructed the access of light to windows occupying the same position as those of the late church. The Ecclesiastical Commissioners commenced an action to restrain the erection of the proposed buildings:—*Held*, by the Court of Appeal, reversing the deci-

LIGHT—*continued.*
sion of *Hall*, V.C., that the fact of there being no existing windows the access of light to which would be interfered with, was no objection to the granting an injunction if the right to access of light had not been abandoned:—*Held*, also, that the Ecclesiastical Commissioners had power to sell the site, with all the easements which had been enjoyed by the church, so that if the church had ancient lights the purchaser would have the benefit of them:—*Held*, also, that although the freehold of both the church and the glebe had throughout been vested in the rector, there was no such manifest impossibility for the church to have a title by prescription or grant to access of light over the glebe as to induce the Court to refuse an interim injunction till the trial:—And, *semble*, that such an easement might be effectually created. Ecclesiastical Commissioners for England *v.* Kino - - - C. A. 213

LIMITATIONS, STATUTE OF—*Adverse Possession—Concealed Fraud — Discontinuance — Cellar under Ground*—3 & 4 *Will.* 4, *c.* 27, *s.* 26.] Under the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, the right to land is extinguished, in the absence of fraud, after a discontinuance of possession for the period enacted in the statute, although the owner so discontinuing possession was unaware that adverse possession had been taken.—If *A.* has occupied a cellar under the ground of *B.* for sixty years, this is, in the absence of fraud, a discontinuance of possession on the part of *B.* within the meaning of the statute, though *B.* was ignorant of such occupation. Rains *v.* Buxton 537

2. —— *Promissory Note payable Three Months after Demand—Demand—Payment of Interest.*] In May, 1857, *J. R.* gave to *R. R.* a promissory note for payment of £150 three months after demand, no interest being reserved. *J. R.* died in 1869, and *R. R.* in 1878. The note was in *R. R.'s* possession at his death, and he had indorsed upon it receipts in November, 1857, and August, 1858, each for half a year's interest. It appeared that no other interest had ever been paid. *J. R.'s* estate being administered by the Court, *R. R.'s* executor claimed to prove on the promissory note:—*Held*, by *Hall*, V.C., that the claim must be allowed for £150, with interest from May, 1858:—*Held*, on appeal, that the admissions by the payee of the payment of interest were evidence of a demand having been made in 1857 so as to make the £150 immediately payable, and that the *Statute of Limitations* was a bar to the claim.—*Semble*, that, apart from the *Statute of Limitations*, the claim ought to have been rejected as a stale demand. *In re* Rutherford. Brown *v.* Rutherford C A. 687

LIQUIDATOR—Official—Costs—Priority - 167
See Company. 4.

LOCAL AUTHORITY—Purchase of land—Costs of payment out of Court - - 624
See Lands Clauses Act. 1.

LOCAL GOVERNMENT ACTS—*Time limited for Complaint to Justices—Expenses of Sewering and Paving Roads—Cross-notice by Owner on whom Demand for Payment of Apportionment has been made, disputing the Amount, and disputing the Liability — Distinction between Jurisdiction of*

LOCAL GOVERNMENT ACTS—*continued.*
Justices and Jurisdiction of Arbitrator—Jervis's Act (11 & 12 *Vict. c.* 43), *s.* 11—*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 68, 69, 123, 129—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *ss.* 62, 63.] Notices to sewer and pave roads having been, in 1872, served by a Board of Health on an owner, he took no notice during his lifetime, and the works having been executed by the board, notices to pay apportionments were on the 30th of July, 1875, served on the tenant for life under the will of the owner, and on the executors, who within the statutory three months served counter-notices on the board, disputing the amount of the apportionments, and alleging that the roads were public roads. The board then commenced proceedings by arbitration, which the owners refused to attend, and in their absence an award was made in favour of the board on the 9th of August, 1877. On the 19th of January, 1878, the award was made a rule of the Queen's Bench Division. On the 12th of February notices of demand were served by the board on the owners, and on the 9th of July, 1878, proceedings in the Queen's Bench Division to enforce the award were commenced and subsequently abandoned. On the 1st of August, 1878, proceedings were taken in the Queen's Bench with reference to the costs of the award, and these, on the 23rd of January, 1879, were transferred to the Chancery Division, in which an administration action was pending:—*Held*, by *Bacon*, V.C., that, where a notice, served by a Board of Health upon an owner, calling upon him to pay an apportionment of expenses incurred in the sewering and paving of roads, is met by a counter-notice disputing the amount alone, such demand may be the subject of arbitration; but where the counter-notice disputes the liability to pay, such a demand must be tried by justices, who, if the counter-notice also disputes the amount, may exercise their jurisdiction as to the amount also.—*Held*, by *Bacon*, V.C., and by the Court of Appeal, that a summons by the board for leave to prove in the administration action for the amount awarded must be refused, on the ground that the remedy of the board was by a summary proceeding before justices, and had become barred by the operation of *Jervis's Act*, 11 & 12 Vict. c. 43, s. 11. West *v.* Downman - - - - C. A. 111

LUNATIC — *Capacity to contract — Delusions — Motion for a New Trial—Issue directed by Court—Rules of Court, Order xxxvi., r.* 27; *Order xxxix., r.* 1*a* (*March*, 1879)—*Practice.*] The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract: it is a question for the jury whether the delusion affected the disposition or contract.—A lessor at the time when he made a lease of a farm laboured under the delusion that it was impregnated with sulphur. On an issue directed as to the capacity of the lessor to make the lease, rational letters by the lessor relating to the lease were put in evidence. The Judge did not tell the jury that the letters did not displace the effect of the delusion, but directed them that it was a practical question whether the lessor was

LUNATIC—*continued.*
so insane as to be incompetent to dispose of his property though believed to be full of sulphur. The jury found that the lease was valid:—*Held*, on a motion for a new trial, that there was no misdirection.—In an action for administration in the Chancery Division, an issue, whether a grant of a lease by the testator was valid, was directed to be tried before a Judge and special jury at the assizes. A motion for a new trial was allowed to be made in the Court which directed the issue, in the absence of any rule of Court directing it to be made elsewhere. JENKINS *v.* MORRIS [C. A. 674

—— Committee—Execution of deed - 249
See LANDLORD AND TENANT.

MAIN DRAINAGE—Metropolis - - 521
See METROPOLIS MANAGEMENT ACTS. 2.

MAINTENANCE—Gift of intermediate income
See WILL. 5. [529

MANAGER—Railway - - - 645
See RAILWAY.

MANUFACTURE—Secret process—Trade-name
See TRADE-NAME. [748

MARRIED WOMAN—Next friend - - 419
See PRACTICE. 9.

—— Separate estate - - - - 837
See HUSBAND AND WIFE.

MAYOR'S COURT—Foreign attachment - 234
See BANKRUPTCY. 13.

MEMBER OF PARLIAMENT—Privilege - 533
See PARLIAMENT.

MEMBER OF TRADE UNION—Expulsion 482
See TRADE UNION.

METROPOLIS MANAGEMENT ACTS (18 & 19 *Vict. c.* 120), *s.* 96—*Vestry—Streets to vest in—Stopped-up Street—Diverted Street.*] The Plaintiff having, with the sanction of the Metropolitan Board of Works, made a new street over his land within the Metropolitan District, upon which land were two old streets, *N. Street* and *A. Street*, an order was made at quarter sessions for stopping up part of *N. Street* as unnecessary, and an order was also made for diverting a part of *A. Street*, and opening the new street in lieu thereof. The vestry of the parish gave notice to the Plaintiff that he must not convert to his own use the stopped-up part of *N. Street*, nor stop up *A. Street*, or convert any part of the soil of it to his own use till he had purchased the same from the vestry:—*Held*, by the Master of the Rolls, that the case was governed by *Coverdale* v. *Charlton* (4 Q. B. D. 104); and that, under 18 & 19 Vict. c. 120, s. 96, the surface of the streets and the soil to such a depth as was required for the purposes of a road was in the vestry, so that when the streets were stopped up or diverted they could sell them under sect. 154; and that the Plaintiff had no right to deal with the soil without purchasing it from the vestry.—*Held*, by the Court of Appeal, that under 18 & 19 Vict. c. 120, s. 96, all streets being for the time being highways are vested in the vestry, but only so long as they are highways, and that when they cease to be highways by being legally stopped up or diverted, the interest of the vestry

METROPOLIS MANAGEMENT ACTS—*contd.*
determines:—*Held*, therefore, that the Plaintiff was entitled to convert to his own use the stopped-up part of *N. Street* and the diverted part of *A. Street*, subject, as to *A. Street*, to his first obtaining a certificate, under 5 & 6 Will. 4, c. 50, s. 91, that the substituted street had been completed and put into good condition and repair. ROLLS *v.* VESTRY OF ST. GEORGE THE MARTYR, SOUTHWARK [C. A. 785

2. —— (18 & 19 *Vict. c.* 120), *s.* 135—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 61—*Metropolitan Main Drainage—Metropolitan Area, Persons outside—Right to use Drainage—"Any Person making or branching Sewer."*] The *Metropolis Management Act*, 1855, vested in the Plaintiffs an open sewer, called the *Stamford Brook*.—The *Metropolis Management Amendment Act*, 1862, s. 61, enacted that no person should make or branch any sewer or drain, or make any opening into any sewer vested in the Plaintiffs without their consent; but provided that "any person" might with such consent at his own expense make or branch any drain into any such sewer in such manner as the Plaintiffs should direct.—After the passing of the Act of 1855, the Plaintiffs allowed four old cottages belonging to the Defendants, on land just outside the metropolitan area, to continue to drain through an 18-inch brick drain into *Stamford Brook*. They subsequently, at the request of the Defendants, who paid half the cost, covered in the brook, and converted it into a main sewer. When they did this, they made an opening in the newly-covered-in sewer as a communication for the 18-inch drain.—The Defendants having built other cottages outside the area, claimed the right to use this communication for the drainage of such new cottages:—*Held*, that the words "any person" in the 61st section of the Act of 1862 must be construed as meaning "any person" entitled to the benefits of the Act, and accordingly as limited to owners or occupiers within the metropolitan area:—*Held*, also, that the drainage from each additional cottage or building was a separate making or branching of a drain within the meaning of the section:—*Held*, further, that the Plaintiffs had no power to contract to admit buildings outside the metropolitan area into their drainage systems.—Injunction granted to restrain the Defendants from permitting their additional cottages, or any buildings other than the four old cottages, to drain into the *Stamford Brook*. METROPOLITAN BOARD OF WORKS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - 521

MISLEADING CONDITIONS OF SALE 270, 588
See VENDOR AND PURCHASER. 1, 2.

MISTAKE—*Release—Compromise—Ignorance—Unexpected Accession of Property.*] In consideration of certain payments by an executrix, persons interested in the estate gave a release of all claims on the estate to the executrix. It was afterwards discovered that property in which the testator was entitled to a share had during his life been sold at an undervalue. The executrix instituted and succeeded in a suit to set the sale aside, and recovered a large sum of money as part of the testator's estate:—*Held*, that this money was not included in the release, and that the

MISTAKE—*continued.*
persons who gave the release were entitled to share in the money so recovered as part of his estate.—*Howkins* v. *Jackson* (2 Mac. & G. 372) distinguished. Turner *v.* Turner. Hall *v.* Turner - - - - - 829

MORTGAGE—*Building Society—Default on one Mortgage only—Right of Consolidation.*] In 1871, *V.*, being the owner of shares in a building society and entitled to an advance in respect thereof, conveyed property to the trustees to secure the sum advanced, with provisoes for redemption, and that if he paid them the sum, named, monthly for twelve years, and all sums which might become due on the shares, the security should determine and the trustees should indorse a receipt on the deed.—In 1874, *V.* and *N.*, co-partners, being the owners of shares in the society, and entitled to an advance in respect thereof, conveyed partnership property to the trustees to secure the sum advanced, with provisoes for redemption, and that if they or either of them paid the sum, named, monthly for fourteen years, and all sums which might become due on the shares, the security should determine, and the trustees should indorse a receipt on the deed.—In 1875, *V.* and *N.* as debtors, and *V.* as surety, conveyed to their bankers part of the property comprised in the deed of 1871, to secure all moneys due from the firm.— *V.* and *N.* went into liquidation, and trustees were appointed thereunder. Default was made in payment of the monthly instalments secured by the deed of 1874, and arrears became due to the society.—The bankers entered into possession and receipt of the rents of the property mortgaged to them. They paid to the society the monthly instalments secured by the deed of 1871, and in 1878 gave notice to the trustees of the society that they, in accordance with the rules of the society, desired to redeem the property comprised in the deed of 1871, but the trustees refused to allow them to do so unless they also redeemed the mortgage of 1874, and brought an action for a declaration that they were entitled to consolidate their securities:—*Held* (reversing the decision of *Hall*, V.C.), that consolidation only applies where default has been made on all the securities in respect of which it is claimed; and that therefore as there had been no default on the 1871 mortgage the Plaintiffs were not entitled to the consolidation they claimed.—The principles of consolidation discussed and explained.—*Selby* v. *Pomfret* (3 D. F. & J. 595) explained.—*Per James*, L.J.: There can be no consolidation between a mortgage by *A.* for his own debt, and a mortgage by *A.* and *B.* of other property for their partnership debt.—*Beevor* v. *Luck* (Law Rep. 4 Eq. 537) questioned. Cummins *v.* Fletcher [C. A. 699

2. —— *Foreclosure Action—Accounts—Form of Inquiry—Mortgaged Property purchased by Public Body under Statutory Powers—Extra Costs of ascertaining Compensation—"Just Allowances."*] Mortgaged property, the subject of a foreclosure action, was purchased by a public body under their statutory powers, and the sum which had been assessed for compensation was paid into Court:—*Held*, that the mortgagee was only entitled to the ordinary inquiry whether anything and what was due to him for any and what costs, charges, and expenses properly incurred by him in respect of his mortgage security, and that he was not entitled to an express direction for the allowance of his extra costs (beyond those allowed on taxation between himself and the public body) of the inquiry to assess the compensation. Rees *v.* Metropolitan Board of Works - 372

3. —— *Priority—Notice to Solicitors of Trustees—Verbal Notice to Trustees.* The Plaintiffs took a mortgage of a reversionary share in a testator's estate, and gave notice of the incumbrance to a firm of solicitors who were acting for the trustees and executors in a Chancery suit to which the testator had been a party, and were employed by them in all matters relating to the testator's estate in which professional assistance was required. The solicitors wrote accepting the notice on behalf of the trustees. A member of the firm deposed that at the close of a meeting held at his office two months afterwards, with reference to the winding-up of the Chancery suit, and lasting above three hours, the notice was read to the trustees. Two of the trustees positively denied this, and the third denied all recollection of it. There was no further proof of their having received notice of it until after notices of other incumbrances had been duly given to them: —*Held*, by the Court of Appeal, reversing the decision of *Bacon*, V.C., that notice to the solicitors was not good notice to the trustees.—*Held*, further, that evidence of parol notice having been given to the trustees in the course of conversation at the end of a meeting called upon other business, could not be relied upon as fixing the trustees with notice in opposition to their denial of having received it.—*Held*, therefore, that the Plaintiffs must be postponed to the subsequent incumbrancers.—*Held*, that the solicitors in accepting service of the notice on behalf of the trustees were not guilty of a misrepresentation of fact for which they could be made liable, but were acting under an opinion common to both parties, but which was erroneous in point of law, that their employment as solicitors enabled them effectually to accept service of the notice. Saffron Walden Second Benefit Building Society *v.* Rayner - - - - C. A. 406

—— Building society - - - 140
See Building Society.

—— Covenant for compound interest - 348
See Covenant.

—— Covenant to pay money—Interest—Damages
See Interest. [49

—— Power of sale—Sale by mortgagee - 851
See Vendor and Purchaser. 3.

—— Stamp - - - - - 822
See Stamps.

—— Stone quarry—Fixtures - - 379
See Bill of Sale.

—— Transfer—Vendor and Purchaser Act 514
See Vendor and Purchaser. 5.

NEW TRIAL—Motion for - - - 674
See Lunatic.

NEW TRUSTEES—Trustee Act 212, 304, 310
See Trustee Acts. 1, 2, 4.

NEXT FRIEND—Infant - - - 630
See Partition Suit. 4.

—— Married woman - - - - 419
See Practice. 9.

NOTICE—Annuity—Registration - - 563
See Annuity.

—— Claim against co-Defendant - - 329
See Practice. 2.

—— Mortgage—Solicitor of trustees - 406
See Mortgage. 3.

—— Motion for attachment - - - 152
See Practice. 1.

—— To treat - - - - - 305
See Commissioners of Sewers.

NUISANCE—*Public Nuisance—Particular Injury to Individual—Unreasonable Use of Highway—Obstruction of Landowner's Access to Highway—Damages—Loss of Custom in Trade.*] When the private right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable user of the highway he is entitled to recover damages from the wrongdoer in respect of loss of custom in the business which he carries on in his house. He is entitled also to recover damages on the ground that he has suffered a particular injury from a public nuisance.—*Rose* v. *Groves* (5 Man. & G. 613) and *Lyon* v. *Fishmongers' Company* (1 App. Cas. 662) followed.—*Ricket* v. *Metropolitan Railway Company* (Law Rep. 2 H. L. 175) distinguished.—The right of a landowner to use a public highway, *e.g.*, for the purpose of bringing materials for the building of a house on his land, must be exercised reasonably.—If there are several ways of access to the land there is no absolute right to use the most convenient way exclusively, without regard to the convenience of neighbouring landowners. Fritz *v.* Hobson - - 542

ONUS PROBANDI—Death—Person not heard of for seven years - - - 846
See Evidence. 2.

ORDER AND DISPOSITION - - 693
See Bankruptcy. 8.

PAID-UP SHARES—Contract for 400, 432, 634
See Company. 1, 2, 3.

PARLIAMENT—*Contempt—Attachment—Member of late Parliament—Privilege.*] On a motion for attachment of a member of the Parliament which was dissolved on the 24th of March, for contempt in not obeying an order of the Court to pay certain moneys, &c., to the liquidator of the company:—*Held*, that the rule laid down in *Goudy* v. *Duncombe* (1 Ex. 430), that a member of Parliament was entitled to privilege from arrest for forty days both after and before the meeting of Parliament, and whether after a prorogation or a dissolution, applies to a person who was a member of the old, but is not a member of the new, Parliament. *In re* Anglo-French Co-operative Society - - - - - 533

PARTICULAR INJURY—Public nuisance 542
See Nuisance.

PARTICULARS OF SALE—Misleading 270, 588
See Vendor and Purchaser. 1, 2.

PARTITION SUIT—*Practice—Costs—Taxation.*] As a general rule, the costs of a partition action should be borne by the parties in proportion to their interests as declared by the judgment.—*Cannon* v. *Johnson* (Law Rep. 11 Eq. 90) followed.—The costs of a partition action can be taxed as between solicitor and client only by the consent of the parties: otherwise they must be taxed as between party and party. Ball *v.* Kemp-Welch - - - - - 512

2. —— *Sale—Partition Act*, 1868 (31 & 32 *Vict. c.* 40)—*Overriding Trust.*] When the testator has himself fixed the period at which the trustees of his will are to sell his real estate and divide the proceeds, the Court has no jurisdiction to anticipate that period by directing a sale in a partition action at the request of persons equitably entitled to an undivided moiety of the property. Swaine *v.* Denby - - - - - 326

3. —— *Partition Act*, 1868, *s.* 3—*Sale at Request of Persons entitled to less than a Moiety—Form of Judgment—District Registry—Order for Sale.*] Form of judgment in an action under the Partition Acts where the parties to the action are persons entitled to less than a moiety of the property and request a sale.—Where such an action is intituled in the Chancery Division and a District Registry, the usual inquiries may be made in the District Registry, but the application for a sale should be made in the Chambers of the Judge of the Chancery Division to whom the action is attached. Sykes *v.* Schofield - - 629

4. —— *Practice—Infant—Request for Sale—Next Friend—"Guardian"—Partition Act*, 1876, *s.* 6.] In a partition action the request for sale on the part of an infant (*Partition Act*, 1876, s. 6) may be made by his next friend or guardian *ad litem*, as being the "person authorized to act" on his behalf in the action: the word "guardian" in the section meaning guardian *ad litem*.—*Platt* v. *Platt* (28 W. R. 533) not followed.—The Court will not comply with a request for sale made on behalf of an infant under the above section unless it is satisfied that a sale is for the benefit of the infant. Rimington *v.* Hartley - 630

PARTNER—Expulsion of - - - 471
See Partnership. 1.

PARTNERSHIP—*Articles—Power to expel Partner—Arbitration Clause—Charges of Fraud—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11—*Discretion of Court.*] Partnership articles between *A.* and *B.* provided that, if the business should not be conducted to the satisfaction of *B.*, he should have power to give notice to *A.* to determine the partnership; the articles also contained an arbitration clause providing that any differences in relation to the partnership should be referred to arbitration. *B.* having given notice to *A.* for the partnership to be determined, *A.* brought an action against *B.*, alleging various charges of fraud, and claiming that the notice should be declared void, and that *B.* should be restrained from announcing the dissolution of the partnership, whereupon *B.* moved that the matters in question should be referred to arbitration:—

PARTNERSHIP—*continued.*

Held, that the power to give the notice under the articles was exercisable by *B.* at his own will and pleasure:—*Held*, also (*A.* having, in the judgment of the Court, failed to establish a *primâ facie* case of fraud), that the matters in question should be referred to arbitration according to the articles.—In a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a *primâ facie* case of fraud is proved.—Observations of *Wickens*, V.C., in *Willesford* v. *Watson* (Law Rep. 14 Eq. 572) questioned.—*Blissett* v. *Daniel* (10 Hare, 493) and *Wood* v. *Woad* (Law Rep. 9 Ex. 190) distinguished. Russell *v.* Russell - 471

2. —— *Joint Stock Bank—Guarantee—Directors—Ultrà Vires.*] The directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers and to act in such manner as might appear to them best calculated to promote the interest of the bank, have, when the formation of another company is of importance to the bank, power to guarantee the payment of interest on debentures of that company issued for the purpose of forming it. *In re* West of England Bank. *Ex parte* Booker - - - - 317

—— Articles—Arbitration clause - - 200
See Arbitration. 1.

—— Proof in bankruptcy—Joint and separate estate - - - - 122
See Bankruptcy. 9.

PARTY-WALL—Meaning of—Tenants in common - - - - - 192
See Tenant in Common.

PATENT—*Sale in England of a Material made Abroad by a Patent Process — Infringement.*] Where a patent has been granted in *England* for a new process for producing more cheaply a chemical product which was previously known, the importation and sale in *England* of this substance made abroad according to the patented process is an infringement of the patent. Von Heyden *v.* Neustadt - - - C. A. 230

PAYMENT OF INTEREST—Statute of Limitations - - - - 687
See Limitations, Statute of. 2.

PAYMENT OUT OF COURT—Lands Clauses Act [323, 511
See Lands Clauses Act. 2, 3.

PEDIGREE—Evidence of—Recording—Heralds' College—Privileged communication 824
See Heralds' College.

PENSION—*Civil Service—Jurisdiction*—4 *&* 5 *Will.* 4, *c.* 24, *s.* 30; 22 *Vict. c.* 26, *s.* 2.] Under the Acts regulating the superannuation allowances of the Civil Service, the decision of the Commissioners of the Treasury as to the amount of an allowance is final, and no Court of law has jurisdiction in the matter. Cooper *v.* The Queen 311

"PERSON AGGRIEVED"—Appeal - 458
See Bankruptcy. 17.

"PERSON INTERESTED" - - - 807
See Artizans Dwellings Improvement Act.

PERSONAL REPRESENTATIVE—Mortgagor
See Vendor and Purchaser. 5. [514

PETITION—Adjudication of bankruptcy - 71
See Bankruptcy. 2.

—— Winding-up - - - - 104
See Company. 11.

PLEADING - - - - 329, 492
See Practice. 2, 8.

POLICY OF ASSURANCE—Assignment by letter
See Voluntary Settlement. [179

POWER—*Will—Appointment by general Bequest—Power created subsequently to the Will—Contrary Intention*—1 *Vict. c.* 26, *ss.* 24, 27.] By a separation deed *A.* settled his property, reserving to himself a general power of appointment by will over one-third of it, and declaring the trusts of the remaining two-thirds for his wife and children. By his will, executed several months previously to the separation deed, *A.* devised and bequeathed all his property to trustees upon trusts for his wife and children:—*Held* (reversing the decision of *Malins*, V.C.), that the will was a good execution of the power: and that the settlement and the circumstances under which it was executed could not be looked at to shew a contrary intention.—*In re Ruding's Settlement* (Law Rep. 14 Eq. 266) questioned. Boyes *v.* Cook C. A. 53

2. —— *Wills Act, s.* 27—*Settlement—Power of Appointment—General Bequest by Will of subsequent Date — Contrary Intention — Codicil explaining Will.*] By voluntary deed *A.* settled property including £1000 due to him from his son-in-law *B.*—such sum to be allowed to remain owing during *A.*'s lifetime, but not after his death, except on the terms of obtaining security by the assignment of a policy upon *B.*'s life—upon such trusts as *A.* should by will or deed appoint, and, in default of appointment, on trust to pay the interest to *A.* for life, and after his death on trusts for his daughters and their children, under which the interests of daughters ceased on their death without issue.—By a subsequent will *A.* bequeathed his residuary estate on trusts for his daughters and their children, under which daughters dying without issue had power by will to appoint their shares.—By a codicil, after reciting that he had advanced to *B.* other sums besides the £1000, and that under the settlement and under the will, or one of them, his daughter, *B.*'s wife, would be entitled for her life, and their children would be entitled in remainder to a certain share in the property comprised in the settlement, *A.* declared that such share under the settlement or will, or either of them, should be taken to be satisfied out of the moneys owing to him by *B.* other than the £1000. On the day following the execution of this codicil, *B.* assigned to *A.* a policy of assurance on his life as security for £2000 then owing by him to *A.*:—*Held* (affirming the decision of *Bacon*, V.C.), that no contrary intention had been shewn within the meaning of the *Wills Act*, s. 27: and, accordingly, that the residuary gift in the will was an execution of the general power reserved by the settle-

POWER—*continued.*
ment.—*Held*, also, that the execution of the assignment of the policy was not one of the surrounding circumstances which could be looked at for the purpose of ascertaining the testator's intention.—Whether a codicil can be read with a will for the purpose of ascertaining the intention of the testator in the will, *quære*.—In ascertaining whether a testator has shewn an intention not to execute a general power of appointment by a residuary gift, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger.—Observations on *Moss* v. *Harter* (2 Sm. & Giff. 458) and Lord *St. Leonards'* comments upon it (Sugden on Powers, 8th Ed. p. 306). *In re* Clark's Estate. Maddick *v.* Marks - - - - - C. A. 422
—— Execution by will—Ademption by change of securities - - - 162
See Will. 1.
—— To dispose of property *inter vivos* and not by will - - - - 263
See Will. 3.

POWER OF SALE—Mortgage - - 851
See Vendor and Purchaser. 3.

PRACTICE—*Attachment*—*Service of Notice*—*Rules of Court*, 1875, *Order* XLIV., *r.* 2; *Order* LIII., *rr.* 1, 3.] A notice of motion in any action or matter for the issue of a writ of attachment under Rules of Court, 1875, Order XLIV., rule 2, may be served by leaving the same at the place of residence of the party affected thereby.—*Browning* v. *Sabin* (5 Ch. D. 511) explained. *In re* A Solicitor - - - - - - 152

2. —— *Claim between Co-Defendants—Notice—Rules of Court*, 1875, *Order* XVI., *r.* 17.] In an action by *A.* against his trustees, *B.* and *C.*, to make them jointly and severally liable for the loss occasioned by an investment on insufficient security, in breach of trust, of the trust fund, *B.*, in his statement of defence and counter-claim, claimed contribution from *C.*, as the trustee primarily liable for the alleged breach of trust, if established.—The defence was delivered to *C.*, but there was no order that that should be sufficient notice.—A decree for an account and payment having been made against *B.* and *C.*:—*Held*, on further consideration, that *C.* had sufficient notice within Rules of Court, 1875, Order XVI., rule 17, of *B.'s* claim for indemnity; and that *B.* was entitled to an inquiry how and in what proportions, as between *B.* and *C.*, the sums ordered to be paid to *A.* should be borne and paid. Butler *v.* Butler - - - - 329

3. —— *Costs—Administration Action—Insolvent Estate—Creditor obtaining Conduct.*] The rule that a creditor who brings an action on behalf of himself and all other creditors for the administration of an estate which turns out to be insufficient for the payment of debts is entitled to his costs as between solicitor and client, applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin. *In re* Richardson. Richardson *v.* Richardson - - - 611

4. —— *Costs—Appeal—Objection as to Time—Affidavit filed by Respondent after Appeal set down.*] If a respondent to an appeal takes the objection that the notice of appeal was given too late, and the appeal is dismissed on that ground, the appellant will not be ordered to pay the costs of affidavits filed by the respondent after the appeal was set down. *Ex parte* Fardon's Vinegar Company. *In re* Jones - - C. A. 285

5. —— *Costs—Motion adjourned to Trial—Omission to ask for Costs—Amendment of Judgment—Order* XLI.*a.* (*December*, 1879).] A motion for an interim injunction was adjourned to the trial of the action. No provision was made for the costs of the motion, and liberty to apply was not expressly reserved. At the trial judgment was given for the Plaintiff on the substantial question at issue, with the general costs of the action, less £10 for the costs of an issue upon which he had substantially failed. The Plaintiff's counsel omitted to ask for the costs of the adjourned motion, and no express provision was made for them. Liberty to apply to the Court was expressly reserved. The judgment having been drawn up, passed, and entered, the Taxing Master refused to allow the Plaintiff the costs of the adjourned motion. The Plaintiff then applied to the Court by motion, asking that the judgment might be varied or corrected by giving him the costs of the adjourned motion:—*Held*, that either under the liberty to apply reserved by the judgment, or under the liberty to apply implied in the order adjourning the motion, or by virtue of Order 41a, the Court had jurisdiction to order the payment of the costs in question. And a separate order was made, directing the taxation and payment of the Plaintiff's costs of the motion.—In every order of the Court liberty to apply to the Court is implied, without its being expressly reserved. Fritz *v.* Hobson - - - - 542

6. —— *Costs—Taxation—Order directing an Account of what is due for Costs of Proceedings to enforce Judgment—Discretion of Taxing Master—Objection in Writing to Taxing Master's Certificate—Rules of Court*, 1875 (*Costs*), *Order* VI., *rr.* 26, 30.] Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken by him to enforce a judgment in the Exchequer Division, the Taxing Master to whom the bill of costs was referred disallowed the costs of certain abortive garnishee summonses. On a summons to review the taxation:—*Held*, that the Taxing Master was not precluded by the form of order from disallowing any costs that he thought proper, and that, under Rules of Court, 1875 (Costs), Order VI., r. 26, he was bound to do so; also that the costs in question were properly disallowed.—When a party carries in an objection in writing to the certificate of a Taxing Master under Rules of Court, 1875 (Costs), Order VI., r. 30, he is only bound to state the items to which he objects, not the reasons of his objection. Simmons *v.* Storer - - - - 154

7. —— *Costs—Withdrawal of Defence—Action for Recovery of Land—Rules of Court*, 1875, *Order* XXIII., *r.* 1—*Common Law Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 76), *ss.* 203, 204, 205.] One of the Defendants to an action for the recovery of land was allowed to withdraw his defence, after the action had been in the paper for trial but had been postponed till another action relating to the

PRACTICE—*continued.*
same property should be ready for trial, upon the terms of giving the Plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw.—And, the Defendant having offered in Chambers what the Court considered proper terms, the Plaintiffs were ordered to pay the costs of an adjournment of the summons into Court. Real and Personal Advance Company *v.* McCarthy - - 188

8. —— *Joinder of Causes of Action—"Action for the Recovery of Land"—Action to establish Title—"Possession"—Leave of Court—Rules of Court*, 1875, *Order* XII., *rr.* 18, 19, 20, 21; XIII., *r.* 7; XVII., *r.* 2; XIX., *r.* 15; XXIX., *r.* 7; *Appendix* (*A*), *Part II.*, § *iv.*; *Appendix* (*C*).] An action "to establish title to land," not claiming possession, is not an action "for the recovery of land," so as to require the leave of the Court, under Rules of Court, 1875, Order XVII., rule 2, for its joinder with another cause of action.—*Whetstone* v. *Dewis* (1 Ch. D. 99) not followed.—Where the writ was indorsed for declaration of title, declaration that a lease was granted under a mistake, recovery of rents and profits, and a receiver, and the statement of claim asked also for possession:—*Held*, that this was an action for recovery of land and nothing else, and that there was no joinder of any cause of action which required the leave of the Court. Gledhill *v.* Hunter - 492

9. —— *Next Friend—Married Woman—Security for Costs—Rules of Court*, 1875, *Order* XVI., *r.* 8.] The old rule in Chancery that an application that a next friend should give security for costs must be made before the next material step in the cause is taken, and the old rule at Common Law that the like application must be made before issue joined, are abrogated by the new Judicature Rules; and under Rules of Court, 1875, Order XVI., rule 8, the Court has a judicial discretion to direct security for costs to be given at any time. Martano *v.* Mann - C. A. 419

10. —— *Production of Documents—Rules of Court*, 1875, *Order* XXXI., *rr.* 11, 12—*Motion by Defendant before Defence filed—Plaintiff entitled to Fee—Title Deeds.*] The Defendants, before putting in their statement of defence, moved for the production by the Plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals:—*Held*, that, the land having been conveyed to the Plaintiffs in fee simple, they were *primâ facie* entitled to the land down to the centre of the earth, and unless the Defendants could shew that they were not so entitled the Plaintiffs could not be compelled to produce their title deeds. Egremont Burial Board *v.* Egremont Iron Ore Company - - - 158

11. —— *Receiver—Action for Debt in Common Law Division—Action for Administration—Attachment—Rules of Court*, 1875, *Order* XLV.] A receiver who had been appointed in an administration action and ordered to pay to a legatee a sum quarterly out of moneys in or coming to his hands, was, on the application of creditors who had in an action in a Common Law Division obtained a judgment against the legatee, ordered

PRACTICE—*continued.*
under Rules of Court, 1875, Order XLV., to pay them their debt and costs. *In re* Cowans' Estate. Rapier *v.* Wright - - 638

12. —— *Service out of the Jurisdiction—Notice of Writ—Affidavit of Service of—Form of—Rules of Court*, 1875, *Orders* II., *rr.* 4, 5; IV., *r.* 1; XI., *rr.* 3, 5.] Where leave had been obtained to serve notice of the writ in lieu of service out of the jurisdiction, upon a Defendant who was a Syrian resident at *Beyrout*:—*Held*, that an affidavit of service in the form adopted in the Common Law Divisions was sufficient. Bustros *v.* Bustros - - - - 849

—— Arbitration—Making award a rule of Court
See Arbitration. 2. [593

—— Attachment—Privilege of Parliament 533
See Parliament.

—— Bankruptcy - - 1, 37, 71, 458, 725
See Bankruptcy. 2, 4, 16.

—— Company—Winding-up—Calls - 628
See Company. 7.

—— Damages—Lord Cairns' Act - - 542
See Damages.

—— Lands Clauses Act.
See Cases under Lands Clauses Act.

—— New trial - - - - 674
See Lunatic.

—— Partition suit.
See Cases under Partition Suit.

—— Trustee Acts.
See Cases under Trustee Acts.

PRESUMPTION OF DEATH - - 846
See Evidence. 2.

PRIORITY—Annuity—Registration - 563
See Annuity.

—— Costs in winding-up - - - 167
See Company. 4.

—— Mortgages—Building society - - 140
See Building Society.

—— Mortgage - - - - 406
See Mortgage. 3.

PRIVILEGE—Parliament—Member of late Parliament - - - - 533
See Parliament.

PRIVILEGED COMMUNICATION — Pursuivant of Heralds' College - - 824
See Heralds' College.

PRODUCTION OF DOCUMENTS - - 158
See Practice. 10.

PROMISSORY NOTE—Statute of Limitations—Payment of interest - - 687
See Limitations, Statute of. 2.

PROMOTER OF COMPANY - - - 390
See Company. 8.

PROOF—Bankruptcy - - 82, 122, 579
See Bankruptcy. 9, 10, 15.

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See Bankruptcy. 5.

PUBLIC HEALTH ACT - - - 111
See Local Government Act.

PUBLIC POLICY—Trade union - - 482
See Trade Union.

PURCHASE—Director of company - - 390
See COMPANY. 8.

PURCHASE-MONEY—Lands Clauses Act.
See Cases under LANDS CLAUSES ACT.

PURCHASE WITHOUT NOTICE—Shares - 432
See COMPANY. 2.

PURSUIVANT — Heralds' College — Privileged communication - - - 824
See HERALDS' COLLEGE.

QUALIFICATION—Director acting without 660
See COMPANY. 1.

RAILWAY—*Railway Companies Act*, 1867 (30 & 31 *Vict.* c. 127), *s.* 4—*Rights of Judgment Creditor of Railway—Appointment "of Receiver and, if necessary, of Manager," of Railway.*] The 4th section of the *Railway Companies Act*, 1867, takes away from the judgment creditor of a railway company the right of taking in execution the rolling stock and plant of that company, but gives him new rights, which are independent of the fact whether such company has or has not rolling stock or plant to be taken in execution.—Wherever the judgment creditor of a railway company is unpaid, the appointment of a receiver, or manager, is a matter of right.—And where the debtor company is carrying on its business in the ordinary way, conducting its own traffic arrangements, the appointment of a manager is "necessary" within the meaning of the 4th section.—As a general rule, the directors, or secretary, or some of them, will be appointed by the Court managers where they are acting fairly, and the order for appointment of a manager will be made without prejudice to any application on the part of the directors to propose themselves, or some of their number, to act as managers.—The only evidence required in support of an application under this 4th section by a judgment creditor for the appointment of a manager is an affidavit that he is such a creditor and that his judgment debt is unsatisfied, and that the company is a going concern, carrying on its own business and conducting its own traffic in the ordinary way. *In re* MANCHESTER AND MILFORD RAILWAY COMPANY. *Ex parte* CAMBRIAN RAILWAY COMPANY - - - C. A. 645

REAL SECURITIES—Investment - - 626
See SETTLEMENT. 5.

RECEIVER - - - - - 638
See PRACTICE. 11.

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See RAILWAY.

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See PRACTICE. 8.

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—— Annuity - - - - - 563
See ANNUITY.

—— Bill of sale - - - - 379
See BILL OF SALE.

—— Contract for paid-up shares - - 432
See COMPANY. 2.

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See TRADE-MARK. 1, 2.

REHEARING—Bankruptcy appeal - 1
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See MISTAKE.

RENT—Excessive—Attornment clause in mortgage - - - - - 725
See BANKRUPTCY. 4.

RESCISSION OF CONTRACT - - 851
See VENDOR AND PURCHASER. 3.

RESIDUE - - - - - 817
See WILL. 4.

RESTRAINT ON ANTICIPATION—Judgment against separate estate - - 837
See HUSBAND AND WIFE.

RESTRAINT OF TRADE—*Agreement in Restraint of Trade—Validity—Limitation as to Space—Reasonableness.*] There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space.—The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space.—*Allsopp* v. *Wheatcroft* (Law Rep. 15 Eq. 59) disapproved.—*Leather Cloth Company* v. *Lorsont* (Law Rep. 9 Eq. 345) followed.—If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English Court will not enforce it.—The policy of the English law in favour of trade applies to foreigners trading in *England* equally with English subjects. ROUSILLON *v.* ROUSILLON - - - 351

2. —— *Trader—Sale of Business and Goodwill—Vendor setting up in same Business—"Goodwill"—Fraud—Injunction.*] A trader who has sold his business and goodwill to another for value must abstain not only from soliciting orders from but also from dealing with the old customers.—The meaning of "goodwill" explained.—*Churton* v. *Douglas* (Joh. 174) and *Cruttwell* v. *Lye* (17 Ves. 335) considered.—Form of injunction. GINESI *v.* COOPER & COMPANY - - - - 596

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—— **Order XLVII.** - - - - **41**
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SALE—Article made abroad by patent process
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—— By sheriff before seizure - - **132**
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—— Compulsory—Lands Clauses Act - **27**
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SALE OF GOODS—*Stoppage in Transitu—Sub-sale—Rights of Original Vendor against unpaid Purchase-money of Sub-purchaser—End of Transit—Constructive Delivery—Shipowner's Lien for Freight.*] When the purchaser of goods has re-sold them, though the vendor loses by the resale the right to stop the goods themselves *in transitu*, he is entitled, if he gives that which would, had there been no resale, have been a valid notice of stoppage *in transitu*, to intercept, to the extent of his own unpaid purchase-money, so much of the sub-purchaser's purchase-money as remains unpaid by him.—*Ex parte Golding Davis & Co.* (13 Ch. D. 628) approved and followed.—Per *Bramwell*, L.J.: Observations on *Slubey* v. *Heyward* (2 H. Bl. 504) and *Hammond* v. *Anderson* (1 B. & P. (N.R.) 69). —*Semble*, that notice of stoppage *in transitu* given to a shipowner imposes no duty on him to communicate the notice to the master of the ship, and

SALE OF GOODS—*continued.*
that it is not effectual until it is communicated to the master. *Ex parte* FALK. *In re* KIELL [C. A. 446

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—— Unauthorized—New trustees - - **212**
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SEPARATION DEED—Annuity—Proof in bankruptcy - - - - **579**
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SEPARATE ESTATE—Married woman - **837**
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SET-OFF—Costs—Bankruptcy and in High Court
See BANKRUPTCY. 18. [37

SETTLEMENT—*Construction—Gavelkind Lands—"Right Heirs"—Limitation to "Right Heirs of A., deceased, and B."*] By a voluntary settlement *A.* and his cousin limited certain gavelkind lands to a relative, *C.*, for life, with remainder to her issue, and for default of such issue "to the use of the right heirs of *E.*, deceased, and *J.*"—who was then living—"the two sisters of the said *A.*, their heirs and assigns as tenants in common for ever":—*Held*—the Court declining to read the limitation as a limitation to "the right heirs of *E.*, deceased, and of *J.*"—that *J.* herself took a vested remainder in fee simple in a moiety of the property expectant on the death of *C.* without issue; and, accordingly, that on the death of *C.*, who survived *J.*, and died without issue, the moiety passed to *J.'s* co-heirs in gavelkind. HAWES *v.* HAWES - - - - **614**

2. —— *Covenant to insure Life—Absolute or Conditional—Breach—Damages.*] By a Scotch marriage settlement dated the 18th of August, 1873, the husband assigned to trustees two policies on his life for £5000 each, expiring respectively on the 2nd and 3rd of July, 1875; and he covenanted "on or before the 2nd of July, 1875," to insure his life in the names of the trustees in the sum of £10,000; the existing and future policies to be held upon trusts for his wife and children.—The husband took no steps towards effecting a new policy until the 1st of July, 1875, shortly

SETTLEMENT—*continued.*
before which date his health, which had previously been good, had become so bad that he was unable to effect an insurance, and in September following he died:—*Held*, that the life having become uninsurable on the 1st of July, 1875, did not relieve the husband from the obligation to insure or pay damages, and that accordingly his estate was answerable in damages to the trustees of the settlement. *In re* ARTHUR. ARTHUR *v.* WYNNE - - - - - - - 603

3. —— *Equity to Settlement—Marriage Settlement—Annuity payable to Husband and Wife "during their joint lives"—Tenancy by Entireties—Liability to Husband's Debts.*] By an antenuptial settlement the wife's father covenanted with the trustees to pay to them during his life an annuity of £60, to be held by them upon trust to pay the same "unto and to the use of the husband and wife during their joint lives," and after the death of the husband to the use of the wife absolutely, with trusts for the husband if he survived her, and for the children:—*Held*, that, as the husband and wife took the annuity as tenants by entireties, the whole of it during their joint lives was liable to the husband's debts, and that the wife had no equity to a settlement out of it. WARD *v.* WARD - - - - - 506

4. —— *Equity to a Settlement — Married Woman—Life Interest—Benefit of Husband and Wife jointly.*] A married woman has no equity to a settlement out of property given for the benefit of herself and her husband during their joint lives and the life of the survivor of them. *In re* BRYAN. GODFREY *v.* BRYAN - - 516

5. —— *Investment—Trustees—"Real Securities"—Long Leaseholds.*] As a general rule long terms of years do not answer the description of "real securities," within the meaning of a power for trustees to lend on mortgage of "real securities." *In re* BOYD'S SETTLED ESTATES - 626

SEWER - - - - - - 521
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SHARE OF RESIDUE - - - 817
See WILL. 4.

SHARES—Director's qualification - - 660
See COMPANY. 7.

—— Paid up—Contract for - 400, 432, 634
See COMPANY. 1, 2, 3.

SHAREHOLDER—Petition for winding up 104
See COMPANY. 11.

SHERIFF—Execution—Sale before seizure 132
See BANKRUPTCY. 12.

SHINGLE—Removal of - - - 58
See FORESHORE.

SHIPOWNER—Lien for freight - - 446
See SALE OF GOODS.

SOLICITOR—Notice to - - - 406
See MORTGAGE. 3.

SPECIFIC LEGACY - - - - 856
See WILL. 2.

SPECIFIC PERFORMANCE - - 270
See VENDOR AND PURCHASER. 1.

STAMPS—*Stamp Act*, 1870 (33 & 34 Vict. c. 97) —*Vendor and Purchaser—Mortgage Deed—Ad valorem Stamp.*] A ten-shilling deed stamp on a mortgage deed is insufficient: therefore a purchaser is entitled, on a contract for sale with a mortgagor, to require the mortgage deed, where so stamped, to be stamped before completion to the full *ad valorem* duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in the conveyance. WHITING TO LOOMES - - - - - - 822

STATUTES:

21 Jac. 1, c. 16—*Limitations* - - 687
See LIMITATIONS, STATUTE OF. 2.

22 & 23 Car. 2, c. 10—*Distributions* - 619
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32 Geo. 3, c. 60—*Fox's Act* - - 864
See LIBEL. 2.

57 Geo. 3, c. XXIX.—*Sewers* - - 305
See COMMISSIONERS OF SEWERS.

3 & 4 Will. 4, c. 27, s. 26—*Limitations* - 537
See LIMITATIONS, STATUTE OF. 1.

—— —— s. 42 - - - - 348
See COVENANT.

4 & 5 Will. 4, c. 24, s. 30—*Pensions* - 311
See PENSION.

1 Vict. c. 26, s. 27—*Wills* - - 53, 422
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8 & 9 Vict. c. 18, ss. 7, 69—*Lands Clauses* 511
See LANDS CLAUSES ACT. 2.

—— —— s. 74 - - - - - 27
See LANDS CLAUSES ACT. 4.

—— —— s. 79 - - - - - 323
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11 & 12 Vict. c. 43, s. 11—*Jervis's Act* - 111
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TENANTS IN COMMON—*Party Wall—Exclusion of one Tenant by the other—Remedy.*] The meaning of the term "party-wall" defined.—The most ordinary and the primary meaning of the term "party-wall" is a wall of which the two adjoining owners are tenants in common. If one of the two tenants in common of such a wall excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction.—The owners in fee of two adjoining houses derived title to them from a common predecessor in title. In the conveyances from that predecessor to the two owners respectively, was contained a declaration that the wall which divided the yards at the back of the two houses should be and remain a party-wall:—*Held*, that the two owners were tenants in common of the wall. WATSON *v.* GRAY - - 192

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TRADE-MARK—*Registration—Word in Foreign Characters—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91)—*Costs.*] A firm of watchmakers who for many years had been in the habit of using the name "*Tod*" in Arabic characters as a trade-mark for watches sent to a particular firm in the East, applied to have it registered as a trade-mark. The Registrar, by the direction of the Commissioners of Patents, refused to register it:—*Held* (affirming the decision of *Bacon*, V.C.), that the mark ought to be registered.—*Held*, also, that the Court had no jurisdiction to give costs. *In re* ROTHERHAM'S TRADE-MARK C. A. 585

2. —— *Registration of similar Trade-mark—* 38 & 39 *Vict. c.* 91, *s.* 6.] *W. & Co.* proposed to register as a trade-mark for ale a triangle with a double outline, inscribing within the double outline the words "*Beccles Brewery.* Established 1830," the inner triangle having within it a conspicuous figure of a church. *B. & Co.*, whose trade-mark for pale ale was a plain triangle, which in use was coloured red, applied to prevent the registration of the proposed trade-mark as being so similar to theirs as to be calculated to deceive:—*Held*, by *James* and *Brett*, L.JJ., affirming the decision of *Jessel*, M.R., *dissentiente Cotton*, L.J., that as *W. & Co.* would be at liberty to print their trade-mark in whatever colour they pleased, and if printed on a red ground it would be so similar to that of *B. & Co.* that a purchaser might be misled, the registration ought not to be allowed. *In re* WORTHINGTON & CO.'S TRADE-MARK C. A. 8

TRADE-NAME—*Secret Process of Manufacture—Right to Use of Name.*] *Joseph Thorley* for many years manufactured and sold extensively an article called "*Thorley's Food for Cattle*," made according to a recipe communicated to him and not known to the public, and down to his death he was the only person who made it. His executors continued the business. Shortly after his death a company was formed by other persons under the name of *J. W. Thorley's Cattle Food Company*, in which *J. W. Thorley*, a brother of *Joseph Thorley*, took a 1*s.* share. *J. W. Thorley* had been employed by *Joseph Thorley*, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "*Thorley's Food for Cattle*":—*Held* (reversing the decision of *Malins*, V.C.), that the company were not at liberty to use the name "*Thorley's Food for Cattle*" unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of *Joseph Thorley.*—*James* V. *James* (Law Rep. 13 Eq. 421) observed upon. MASSAM *v.* THORLEY'S CATTLE FOOD COMPANY - C. A. 748

TRADE UNION—*Expulsion of Member—Claim to participate in Property and Benefit of the Union—Restraint of Trade—Illegal Association—Trades Unions Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.] The foundation of the jurisdiction of the Court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he is deprived.—The rules of a trade union provided that the money arising from the subscriptions of its members should be applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, and provided that any journeyman binding his son in a "foul shop" (being a shop in which non-union men were employed) should be fined, and not be entitled to any benefit until such fine had been paid. The Plaintiff, a member of the union, who was alleged to have broken the rule as to apprenticeship, and who, having refused to pay the fine, had been expelled from the union, brought his action against the committee and trustees of the union claiming to be entitled to participate in its benefits, and that the Defendants might be restrained from excluding him from such participation:—*Held*, that as the action was brought to enforce an agreement between members of a trade union "to provide benefits to members," within the meaning of the *Trades Union Act*, 1871, s. 4, which the Court was not by that section enabled to enforce; and as, apart from the Act, the union was an illegal association, the Plaintiff was not entitled to any relief. RIGBY *v.* CONNOL - - 482

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TRUSTEE ACTS—*New Trustees—Persons out of the Jurisdiction.*] Where all the *cestuis que trust* are resident out of the jurisdiction, the Court will appoint new trustees resident out of the jurisdiction. *In re* Liddiard - - - 310

2. —— *Practice — New Trustees — Vesting Order as to Stock—No Legal Personal Representative of Survivor of Original Trustees—Trustee Act*, 1850, *s.* 25.] The survivor of two trustees of stock under a will having died leaving no legal personal representative, the *cestuis que trust* and two new trustees, who had been appointed under a power in the will, presented a petition asking that the right to transfer the stock—which was then standing in the names of the deceased trustees—might vest in the new trustees, under sect. 25 of the *Trustee Act*, 1850:—The Court made the order—considering itself bound by *In re Dalgleish's Settlement* (4 Ch. D. 143)—but without reappointing the new trustees. *In re* Crowe's Trusts 304

3. —— *New Trustees—Vesting Order as to Stock—No Legal Personal Representative of Survivor of Original Trustees — Form of Order — Trustee Act*, 1850—*Trustee Extension Act*, 1852.] Form of vesting order as to stock settled by will where the survivor of the two original trustees has died without a legal personal representative, and new trustees have been appointed under the will.—*In re Crowe's Trusts* (14 Ch. D. 304) corrected. *In re* Crowe's Trusts (No. 2) - 610

4. —— 1850, *s.* 26—*Trustee Extension Act*, 1852, *s.* 6—*New Trustees—Transfer of Securities—Unauthorized Securities—Form of Order.*] Form of order on appointment of new trustees where the trust funds are invested on unauthorized securities and it is desired not to transfer them into the names of the new trustees, but to sell them and reinvest the funds in accordance with the trusts of the settlement. *In re* Peacock [C. A. 212

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VENDOR AND PURCHASER—*Conditions of Sale—Misleading Particulars—Specific Performance with Compensation.*] A farm was put up for sale under the direction of the Court by particulars accompanied by a plan, and was described as "a compact small farm containing 41a. 3r. 35p., divided as follows." Among the parcels was "490a, *Bottlesey Green*, containiug 7a. 1r. 27p." opposite to which, in the column shewing the amounts which made up the 41a. 3r. 35p., was entered 4a. 0. 38p. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such (if any) as the Judge in Chambers should direct. *G.* bought the property in his own name, and was certified as purchaser. He in fact bought as agent for *B.*, who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490a, which was a narrow close containing 7a. 1r. 27p., having a long frontage to a high-road, and at one end adjoined *B.'s* property. *B.* alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490a, and *G.*, by his directions, refused to complete. The vendors then entered into an arrangement with the owner of the other three-sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—*Held*, by the Master of the Rolls, that, as *B.* had not been substituted as purchaser, *G.* must be treated as the real purchaser, and could not take any objection depending on the circumstances of *B.'s* property, and that, as the arrangement would give the purchaser all he contracted to buy, he must complete without compensation.—*Held*, on appeal, that *G.*, having only purchased as agent for *B.*, could take any objection which *B.*, had he been the nominal as well as the real purchaser, could have taken; that, for the purpose of resisting completion, the purchaser was entitled to say that he bought the farm as shewn on the plan; that, as the possession of 490a was important to the enjoyment of *B.'s* property, completion could not be compelled unless he could get the whole of it, and that he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property; and that he must therefore be discharged from his purchase. *In re* Arnold. Arnold *v.* Arnold [C. A. 270

2. —— *Conditions of Sale—Misleading Particulars.*] Leaseholds in *Liverpool* were put up for sale under the direction of the Court in four lots, under a condition that the purchasers should enter into the usual covenant for paying and observing the rents and covenants of the leases, and indemnifying the vendors therefrom. There was no condition as to the leases being produced, nor that the purchasers should be deemed to have notice of their contents. As to one of the lots, the particulars stated the rents at which the different parts of it were underlet, and the amount of a mortgage on it; but, owing to a slip, did not mention that it was subject to any ground rent. It was, in fact, subject to a ground rent of £43. The other lots were leaseholds held under the corporation of *Liverpool*, which usually reserves only a nominal rent on its leases. A purchaser bought this lot for £1400, and applied to be discharged from his purchase, both he and his

VENDOR AND PURCHASER—*continued.*
solicitor deposing that they were led by the particulars to believe, and did believe, that the property was not subject to any ground rent:—*Held* (affirming the decision of *Little*, V.C.), that the purchaser was entitled to be discharged. Jones *v.* Rimmer - - - - C. A. 588

3. —— *Conditions of Sale—Sale of Leasehold Property by Mortgagee under Power—Requisitions—Subsequent Disclosure of Equitable Mortgage—Rescission of Contract — Vendor and Purchaser Act*, 1874.] At a sale by auction of leasehold property by a mortgagee under a power one condition of sale was that within the time limited from the delivery of the abstract the purchaser should send to the vendor's solicitors his requisitions on the title or evidence, and in default of any he should be deemed to have accepted the title, and for the purpose of requisitions the abstract was to be deemed to be perfect if it supplied the information suggesting the same, and if the purchaser should insist on any requisition which the vendor should be unable or should decline to comply with, he should be at liberty to rescind the contract. An abstract was delivered, but it did not shew the real state of the title. After requisitions were sent and replies received, the purchasers' solicitors were informed by mortgagees that the property had been mortgaged by deposit of an underlease to them. The vendor, who was not aware of the mortgage, was required to pay the amount due to the mortgagee, but his reply was that he was unable and unwilling to satisfy the claim, and that he would rescind the contract. The purchasers insisted on the mortgage being discharged, and upon a summons under the *Vendor and Purchaser Act*, 1874, a declaration was made that the vendor was not entitled under the condition and circumstances to rescind. *In re* Jackson and Oakshott 851

4. —— *Fire Insurance—Insurance by Vendor—Fire after Contract, but before Completion—Right to Insurance Moneys.*] A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. After the date of the contract, but before the date fixed for completion, the house was burnt, and the vendor received the insurance money from the office. The contract contained no reference to the insurance:—*Held*, that the purchaser was not entitled as against the vendor to the benefit of the insurance, either by way of abatement of the purchase-money or reinstatement of the premises. —*Quære*, whether in such a case, a contract of fire insurance being merely a contract of indemnity, the insurance company cannot compel the vendor to refund the money they have paid, if he gets his full purchase-money from the purchaser. Rayner *v.* Preston - - - - 297

5. —— *Vendor and Purchaser Act*, 1874, *s.* 4—*Transfer of Mortgage — Conveyance by Legal Personal Representative of Mortgagor.*] The 4th section of the *Vendor and Purchaser Act*, 1874, does not apply to a transfer of a mortgage; and therefore the legal personal representative of a mortgagee of a freehold estate cannot, on receiving payment of the mortgage debt, convey the estate to a transferee. *In re* Spradbery's Mortgage [514

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VOLUNTARY SETTLEMENT — *Assignment by Letter to Trustee of Marriage Settlement—Voluntary Settlement in favour of Children—Bequest by Will of Residue.*] *K.*, who in 1850 made a settlement for the benefit of himself, wife, and children of the marriage, being a widower in 1863 with four children, and about to contract a second marriage, wrote to one of the two trustees of the settlement a letter in which he said he was desirous of making a settlement upon his four children of six policies of assurance on his own life, the particulars of which he gave. Three of the policies were handed to the trustee, but the other three were deposited with the office as a collateral security and were to be subject thereto; but he undertook to pay off the amount claimed, so as to leave the policies free for the children. The trusts and provisions of the settlement were to be similar to those of the settlement of 1850, and he undertook to execute to the trustee written to and another trustee to be named an assignment of the six policies, to contain covenants to keep up the policies, and to pay the mortgage debt, and until the settlement should be executed he was to be bound by the agreement in the same manner as if the settlement were actually executed. In a letter written to the same trustee two days later enclosing the former letter, *K.* said, "The enclosed is the formal letter of assignment previous to a deed, and as binding." No notice of the letters was ever given to the offices, no formal settlement of the policies was ever executed, and no notice was ever given to the other trustee of the settlement. The trustee written to died in 1871; and the settlement of 1850, the two letters, and the three policies were returned to *K.*, who by his will in 1875 gave the residue of his property to trustees for the benefit of all his eleven children: —*Held*, that what was done by *K.* was sufficient to make a complete assignment of the six policies for the benefit of his four children. *In re* King. Sewell *v.* King - - - - 179

WILL—*Ademption—Execution of a Power—Change of Investment.*] By a post-nuptial settlement a specific sum of bank annuities was settled so as to give the wife a general power of appointment by will. Three days after the settlement the wife made her will in execution of the power, and apportioned the sum of bank annuities between three appointees. Subsequently a portion of the bank annuities was, with the consent of the wife and her husband, sold out under a power of varying securities contained in the settlement, and invested in railway stock:—*Held*, that the legacies

WILL—*continued.*

appointed by the will were not adeemed by the subsequent change in the investment of the fund, but that the appointees took the railway stock in the proportions in which the bank annuities were appointed to them by the will. *In re* Johnstone's Settlement - - - - - 162

2. —— *Ademption—Specific Legacy—Gift of "My Debentures"—Debenture Stock.*] A testator having certain debentures at the date of his will, thereby gave "all my debentures" upon certain trusts. After the date of the will the testator exercised an option given him by the company who had issued the debentures, and converted them into debenture stock of the same company:—*Held*, that the debenture stock did not pass by the will. *In re* Lane. Luard *v.* Lane - 856

3. —— *Life Estate—Power of Appointment.*] A testator by his will gave all his property to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease, should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons:—*Held* (affirming the decision of *Hall*, V.C.), that the widow had no power to dispose of the property by will, and that on her death it went to the ulterior takers named in the husband's will.—Whether she took anything more than a life estate with a right to enjoy the property in specie, *quære*. *In re* Thomson's Estate. Herring *v.* Barrow [C. A. 263

4. —— *Residue—Direction that Share of Residue shall sink into Residue.*] A testator, by his will dated in 1853, after appointing trustees and executors, gave to them his residuary real and personal estate in trust for sale, and to divide the proceeds "among all his children in equal shares" on their respectively attaining twenty-one, but to stand possessed of the share of his married daughter *I.* upon trusts for her during her life, and after her death for her children, and, in default of children, upon trust for such persons as she should appoint; and in default of appointment, the testator directed that such share should "fall into and become part of his said residuary personal estate, and be paid and applied accordingly."—By a codicil the testator varied the ultimate gift by directing that his daughter's power of appointment should be limited to a moiety of her share of the residue, and that the other moiety should "fall into and become part of his residuary personal estate, and be paid and applied according to the trusts of his will."—The testator left seven children, including his daughter *I.*, all of whom attained twenty-one. The daughter died without issue, but having appointed the first moiety of her one-seventh share of the residuary estate to her husband:—*Held*, that the second or unappointable moiety of her one-seventh was not undisposed of by the testator, but was divisible equally among his other six children as residuary legatees.—*Humble* v. *Shore* (7 Hare, 247; 1 H. & M. 550) and *Lightfoot* v. *Burstall* (1 H. & M. 546) considered. Crawshaw *v.* Crawshaw - 817

5. —— *Trust for Sons at Twenty-five—Direction to pay when youngest Child attained Twenty-one—Gift of Intermediate Income for Maintenance—Discretionary Power—Vested or Contingent Interest.*] A testator directed his trustees to hold a trust fund upon trust for "all his children or any his child who being sons or a son should attain twenty-five, or being daughters or a daughter should attain twenty-one or marry, and if more than one, in equal shares, and to be divided and paid on the youngest of his said children attaining twenty-one"; and he empowered his trustees to apply "the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child." The testator had only two children, the elder a son, and the younger a daughter. Upon petition by the son, presented after the daughter had attained twenty-one but before he had himself attained twenty-five:—*Held*, that his interest under the will was not vested, but contingent on his attaining twenty-five:—*Fox* v. *Fox* (Law Rep. 19 Eq. 286) distinguished. Dewar *v.* Brooke - - 529

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